CPI's Africa Column Presents:

The increasing significance of public interest considerations in the South African merger control context

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*Public interest considerations have played an increasingly prominent role in merger assessments undertaken by the South African competition authorities over the past few years. The recent transaction leading to the creation of Africa's largest Coca-Cola bottler, Coca-Cola Beverages Africa Limited ("**CCBA**"), was no exception.*

Introduction

The CCBA transaction, which was ultimately conditionally approved by the South African Competition Tribunal (the "**Tribunal**"), involved intervention from numerous parties including the Minister of Economic Development (the "**Minister**"), market participants and trade unions. Each of these parties raised varying concerns with the transaction, as did the South African Competition Commission (the "**Commission**"). Although most of these concerns were addressed after extensive negotiations between the parties, the process involved in achieving this outcome provides interesting perspective into the current prominence that the South African competition authorities afford to public interest considerations, even in the absence of clear competition law concerns or theories of harm.

Details of the Coca-Cola Beverages Africa Limited transaction

The transaction involved two main components in South Africa. Firstly, The Coca-Cola Company ("**TCCC**"), SABMiller plc ("**SABMiller**") and Gutsche Family Investments ("**GFI**"), majority shareholders in Coca-Cola Sabco Pty Limited ("**Coca-Cola Sabco**"), combined the bottling operations of their non-alcoholic ready-to-drink beverages businesses in Southern and East Africa to create a single TCCC authorised Coca-Cola bottler, CCBA. Secondly, TCCC acquired SABMiller's Appletiser brands. On 19 March 2015, TCCC, SABMiller, and Coca-Cola Sabco submitted the merger filing in respect of the proposed transaction to the Commission, which was conditionally approved by the Tribunal some 14 months later.

The assessment of public interest considerations in South African merger control

In terms of section 12A of the South African Competition Act 89 of 1998 ("the **Competition Act**"), if it appears that a merger is likely to substantially prevent or lessen competition, the competition authorities must determine (i) whether or not the merger is likely to result in any technological, efficiency or other pro-competitive gain which will be greater than, and offset, the effects of any prevention or lessening of competition that may result from the merger; and (ii) whether the merger can or cannot be justified on substantial public interest grounds.

When performing the second of these two assessments, the Commission or the Tribunal must consider various factors, including the effect that the merger will have on a particular industrial sector or region; employment; the ability of small businesses, or firms controlled or owned by historically disadvantaged persons to become competitive; and the ability of national industries to compete in international markets.

In terms of section 18(1) of the Competition Act, the Minister may participate as a party in intermediate or large merger proceedings before the competition authorities in order to make representations on any public interest grounds referred to in section 12A(3) of the Competition Act.

This formal involvement by the Minister was evident in the CCBA transaction and, although minimal competition law concerns were considered, the primary issues raised by the Commission, market participants and the Minister related to public interest considerations and the effect of the merger on the South African economy.

Pursuant to the negotiations between the parties, the Commission recommended a number of extensive and far reaching conditions aimed at addressing what the Commission considered to be the negative impact of the merger on domestic suppliers, employment, small businesses and broad-based black economic empowerment. These conditions were largely accepted by the Tribunal. The Minister's input throughout the negotiation process, and eventual agreement to the conditions, was imperative to reaching a point of finality on the transaction.

Addressing socio-economic factors

The CCBA transaction was novel in many ways, but perhaps the most significant is the practical impact on merger parties arising from Government's legitimate requirement to address socio-economic issues.

Based on the final conditions imposed upon the merger parties, it appears as though Government is using merger control as a means of addressing broader socio-economic issues, arguably beyond the scope of the factors listed in section 12A(3) of the Competition Act. This position is further entrenched by the Commission's final guidelines on the assessment of public interest provisions in merger regulation. These guidelines, although not binding, give an indication of the approach that the Commission is likely to follow and the types of information that the Commission may require when evaluating public interest grounds. Significantly, the Commission is entitled to take into account factors including public policy goals, social projects, industrial and government policies and constitutionally enshrined rights when considering public interest grounds. Such broad terms are not defined in the guidelines and may have far reaching implications for merger parties as the exact scope and limitations of these concepts is unknown.

Conclusion and recommendations

The need to ensure economic stability and job retention and to address broader socio-economic factors in South Africa cannot be disputed. However, how these policy objectives align with the current provisions of the Competition Act, and with the commercial imperatives of merger parties, is a tension that is sure only to heighten following the CCBA merger.

Whether the legislature ought to further regulate the Minister's role in merger proceedings, or whether the Commission ought to provide clarity and transparency regarding its role on the application of public interest considerations, the current position makes the merger notification process unpredictable for the merger parties and must be addressed in order to maintain investor confidence and promote the efficiency of the South African merger control regime.

The Tribunal's conditional approval of the CCBA merger also evidences a recurring trend in competition law in South Africa where the competition authorities approve transactions subject to conditions, despite those transactions not raising clear competition law concerns and in instances where any possible public interest concerns are arguably not merger specific. As things stand, merger parties notifying their merger in South Africa, particularly in large, multi-jurisdictional transactions, must therefore be prepared to engage extensively with the

Minister on public interest considerations and, subsequently, make provision for extended timeframes in relation to the approval of the merger, where necessary.