

competitiontribunal
SOUTH AFRICA

THE COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: LM262Jan18

In the large merger between:

British American Tobacco Holdings South Africa
Proprietary Limited

Primary Acquiring Firm

And

Twisp Proprietary Limited

Primary Target Firm

Philip Morris South Africa (Pty) Ltd

First Intervening Party

Gold Leaf Tobacco Corporation (Pty) Ltd

Second Intervening Party

Panel: A Wessels (Presiding Member)
E Daniels (Tribunal Member)
I Valodia (Tribunal Member)

Heard on: 05 August 2019 to 06 August 2019


Last submission received on: 08 August 2019

Decided on: 13 August 2019

ORDER

Further to the recommendation by the Competition Commission in terms of section 14A(1)(b) of the Competition Act 89 of 1998 ("the Act") the Competition Tribunal orders that –

1. the merger between the abovementioned parties be approved in terms of section 16(2)(b) of the Act subject to the conditions attached hereto; and
2. a Merger Clearance Certificate to approve the merger with conditions be issued in terms of Competition Tribunal Rule 35(5)(a).



Presiding Member
Mr A Wessels

13 August 2019
Date

Concurring: Mr E Daniels and Prof. I Valodia

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And

Twisp Proprietary Limited Primary Target Firm

Philip Morris South Africa (Pty) Ltd First Intervening Party

Gold Leaf Tobacco Corporation (Pty) Ltd Second Intervening Party

CONDITIONS

1. DEFINITIONS AND INTERPRETATION

1.1 In this document the following expressions bear the meanings assigned to them below and related expressions bear corresponding meanings:

1.1.1 **“Acquiring Firm”** means British American Tobacco Holdings South Africa Proprietary Limited, a private company incorporated under the laws of the Republic of South Africa;

- 1.1.2 **“Approval Date”** means the day the Form CT 10 is issued by the Tribunal;
- 1.1.3 **“Commission”** means the Competition Commission of South Africa, a statutory body established in terms of section 19 of the Competition Act;
- 1.1.4 **“Competition Act”** means the Competition Act, No. 89 of 1998, as amended;
- 1.1.5 **“Conditions”** mean the conditions set out herein;
- 1.1.6 **“Days”** mean any business day being a day which is not a Saturday, Sunday or an official holiday in South Africa;
- 1.1.7 **“Implementation Date”** means the date, occurring after the Approval Date, on which the Merger is implemented by the Merger Parties;
- 1.1.8 **“Merger Parties”** mean the Acquiring Firm and the Target Firm and their respective subsidiaries or firms otherwise under their control;
- 1.1.9 **“Merger”** means the acquisition of control by the Acquiring Firm over the business of the Target Firm;
- 1.1.10 **“Retailers”** mean grocery or liquor chains, pharmacies, convenience stores, service station forecourts, speciality tobacconists and specialist RRP kiosks or stores not owned by or operating under any of the Merger Parties' brands;

- 1.1.11 **“Retail Spaces”** mean any space within a shopping mall, strip mall, non-duty free airport shopping area or other shopping centre which can be rented for a kiosk or shop to sell RRP products in South Africa;
- 1.1.12 **“RRP”** means a product that presents, is likely to present, or has the potential to present less risk of harm to smokers than traditional cigarettes, and includes vaping and heat-not-burn tobacco products;
- 1.1.13 **“Slots”** mean periods of time during which point of sale material (such as cash mats, till clips, counter display units, etc.) can be displayed in Retailers’ points of sale and which allows a manufacturer or supplier to display or communicate information relating to its products at the point of sale;
- 1.1.14 **“South Africa”** means the Republic of South Africa;
- 1.1.15 **“Target Firm”** means Twisp Proprietary Limited, a private company incorporated under the laws of South Africa;
- 1.1.16 **“Tribunal”** means the Competition Tribunal of South Africa, a statutory body established in terms of section 26 of the Competition Act; and
- 1.1.17 **“Visible Space”** means -
- 1.1.17.1 the total available space in Retailers’ stores allocated to RRPs visible to consumers and unobstructed by other items such as promotional material or pricing information; and/or

1.1.17.2 the total available space at Retailers' points of sale allocated to RRPs located at or above countertop height visible to consumers and unobstructed by other items such as promotional material or pricing information.

2. CONDITIONS TO THE APPROVAL OF THE MERGER

Competition Conditions

From the Approval Date and for a period of 5 (five) years from the Implementation Date -

2.1 The Merger Parties shall not enter into agreements or arrangements with Retailers in terms of which the Merger Parties require Retailers not to sell any RRP products other than those of the Merger Parties, or incentivise Retailers on condition that they not sell any RRP products other than those of the Merger Parties.

2.2 The Merger Parties shall not enter into agreements or arrangements with owners or administrators of Retail Spaces in terms of which the Merger Parties require such owners or administrators not to rent Retail Spaces for the sale of any RRP products other than those of the Merger Parties, or incentivise such owners or administrators on condition that they not rent Retail Spaces for the sale of any RRP products other than those of the Merger Parties.

2.3 The Merger Parties shall not enter into agreements or arrangements with Retailers in terms of which the Merger Parties require Retailers to allocate to the Merger Parties more than 70% of the Visible Space allocated to

RRPs, or incentivise Retailers on condition that they allocate to the Merger Parties more than 70% of the Visible Space allocated to RRP.

2.4 The Merger Parties shall not -

2.4.1 require Retailers to prohibit manufacturers or suppliers of RRP other than the Merger Parties from selling, displaying and/or promoting their RRP or from being allocated shelf space for their RRP, or incentivise Retailers on condition that they so prohibit;

2.4.2 require or incentivise Retailers not to exercise their own discretion in the allocation of Visible Space for RRP to the Merger Parties and/or suppliers of RRP other than the Merger Parties;

2.4.3 require Retailers to prohibit manufacturers or suppliers of RRP other than the Merger Parties from bidding for or acquiring Slots, or incentivise Retailers on condition that they so prohibit;

2.4.4 require Retailers to prohibit manufacturers or suppliers of RRP other than the Merger Parties from displaying communication, promotional, marketing or advertising material in relation to their RRP, or incentivise Retailers on condition that they so prohibit;

2.4.5 require Retailers to purchase RRP manufactured or supplied by the Merger Parties where those arrangements are linked to volumes of the Merger Parties' traditional cigarettes purchased and/or sold by Retailers;

- 2.4.6 enter into any arrangements with Retailers relating to the supply of traditional cigarettes manufactured or supplied by the Merger Parties that are linked to any arrangements relating to the supply of RRPs manufactured or supplied by the Merger Parties; and
- 2.4.7 require Retailers to prohibit or discourage employees from providing assistance and/or information to customers relating to RRPs manufactured or supplied by firms other than the Merger Parties, or incentivise Retailers on condition that they so prohibit or discourage.

Employment Condition

- 2.5 The Merger Parties shall not retrench any employees in contemplation of the Merger or as a result of the Merger for a period of 2 (two) years from the Implementation Date. For the purposes of this paragraph 2.5, the term “employees” includes employees under fixed term contracts of varying lengths who perform a specific role at the Merger Parties.
- 2.6 For the avoidance of doubt, retrenchments do not include (i) voluntary retrenchment and/or voluntary separation arrangements; (ii) voluntary early retirement packages; (iii) unreasonable refusals to be redeployed in accordance with the provisions of the Labour Relations Act 66 of 1995; (iv) resignations or retirements in the ordinary course of business; and (v) lawful and fair terminations in the ordinary course of business, including but not limited to, dismissals as a result of poor performance.

3. MONITORING OF COMPLIANCE WITH THE CONDITIONS

- 3.1 The Acquiring Firm shall inform the Commission of the Implementation Date within 5 (five) Days of its occurrence.
- 3.2 Within 20 (twenty) Days of the Approval Date, the Acquiring Firm shall publish the Conditions on its South African website, and email the Conditions to the Retailers listed in Annexure A and the owners or administrators of Retail Spaces currently leased to the Target Firm, in order to promote awareness of the Conditions. The Conditions shall remain available on the aforementioned website for a period of 90 (ninety) Days from the date of publishing.
- 3.3 Within 20 (twenty) Days of the Approval Date, the Acquiring Firm shall confirm to the Commission in writing that it published the Conditions on its South African website and emailed the Conditions to the Retailers listed in Annexure A and the owners or administrators of Retail Spaces currently leased to the Target Firm.
- 3.4 The Acquiring Firm shall circulate a copy of the Conditions within 5 (five) Days of the Approval Date to the Vapour Products Association of South Africa.
- 3.5 As proof of compliance thereof, a director of the Acquiring Firm shall within 10 (ten) Days of circulating the Conditions, submit an affidavit attesting to the circulation of the Conditions and provide the Commission with a copy of the notice that was sent to the Vapour Products Association of South Africa.

- 3.6 The Acquiring Firm shall submit an affidavit on each anniversary of the Approval Date, confirming compliance with clauses 2.1 to 2.4.7 of the Conditions for a period of 5 (five) years from the Implementation Date, and with clause 2.5 of the Conditions for a period of 2 (two) years from the Implementation Date. This affidavit shall be deposited to by the relevant director of the Acquiring Firm.
- 3.7 The Commission may request any additional information from the Acquiring Firm which the Commission from time to time deems necessary for the monitoring of compliance with the Conditions.
- 3.8 An apparent breach by the Merger Parties of any of the Conditions shall be dealt with in terms of Rule 37 of the Tribunal Rules read together with Rule 39 of the Commission Rules.
- 3.9 All correspondence in relation to these conditions must be submitted to the following e-mail address: mergerconditions@compcom.co.za.

4. VARIATION

- 4.1 Either or both of the Merger Parties may at any time, on good cause shown, apply with or without the Commission's consent to the Tribunal for any of the Conditions to be waived, relaxed, modified and/or substituted, provided that "good cause" shall not include any circumstances giving rise to the request for variation which are reasonably capable of being mitigated in another manner, or which could reasonably have been foreseen at the Approval Date of these Conditions. The Commission and

the Intervening Parties shall be cited as respondents in any such application and shall not be precluded from opposing such application.

- 4.2 The Commission may at any time, on good cause shown, apply to the Tribunal for the Conditions to be waived, relaxed, modified and/or substituted. The Merger Parties and the Intervening Parties shall be cited as respondents in any such application and shall not be precluded from opposing such application.

NOTIFIED RETAILERS

CONFIDENTIAL