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**GENERAL NOTICES • ALGEMENE KENNISGEWINGS**

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**ECONOMIC DEVELOPMENT DEPARTMENT****NOTICE 149 OF 2017****COMPETITION COMMISSION****NOTIFICATION TO APPROVE WITH CONDITIONS THE TRANSACTION INVOLVING:****DRS DIETRICH, VOIGT, MIA & PARTNERS****AND****DR WJH VERMAAK INCORPORATED****CASE NUMBER: 2015DEC0694**

The Competition Commission hereby gives notice, in terms of Rule 38 (3)(c) of the 'Rules for the Conduct of Proceedings in the Competition Commission, that it has approved the transaction involving the above mentioned firms subject to conditions as set out below:

1. On 29 February 2016 the Competition Commission ("Commission") was notified of an intermediate merger wherein Drs Dietrich, Mia and Partners ("PathCare") intends to acquire majority control in Dr WJH Vermaak Incorporated ("Vermaak"). Post-merger, PathCare and the shareholders in Vermaak, Professor WJH Vermaak and Dr BJ Ubbink will have joint control over Vermaak. The acquiring firm has entered into a restraint of trade agreement with the Sellers.
2. The primary acquiring firm, PathCare, is duly registered in accordance with the company laws of South Africa. PathCare is comprised of substantial partners/pathologists, several of whom are historically disadvantaged individuals. The individual pathologists do not have any other interests. PathCare offers pathology services in various areas including chemical, haematology, microbiology, histology, and virology through in-hospital and out-of-hospital laboratories/depots. PathCare is active in several provinces and has a small presence in the Gauteng province.

3. The primary target firm, Vermaak, a personal liability company duly incorporated in accordance with the company laws of South Africa. Vermaak is jointly controlled by individuals (“Sellers”), who hold equal interest in the company. Vermaak also offers pathology services in various areas including chemical, haematology, microbiology, virology, histology and to a limited extent, molecular testing. Vermaak’s activities are limited to the Gauteng province, particularly in Pretoria and Ekurhuleni.
4. There is a horizontal overlap in the activities of the merging parties, as both PathCare and Vermaak are active in the provision of pathology services to the private healthcare sector. The horizontal overlap with respect to histopathology is marginal. Further, the merging parties have entered into a laboratory services sub-contracting agreement at Mediclinic Midstream Hospital (“Midstream”). In terms of the agreement, Vermaak independently operate pathology laboratory services to Midstream on behalf of PathCare which was appointed as the resident pathology laboratory following its success as a preferred bidder.
5. The Commission assessed the likelihood of unilateral effects and coordinated effects. The assessment of unilateral effects considered whether the merged entity will be able to exercise market power as a result of the elimination of competition between PathCare and Vermaak. Given the symmetry that will exist post-merger, the Commission also considered the likelihood for the proposed transaction to result in coordinated effects. Lastly, the Commission considered whether the relationship of the merging parties at the Midstream was not a prior implemented transaction. The Commission further considered the likely effects of the restraint of trade entered between the merging parties.
6. In defining the market, the Commission considered whether pathology services offered by pathology laboratories can be regarded as a single product.. The Commission concluded on the market for the provision of pathology services to the private healthcare sector in Gauteng although the national market dynamics were considered.
7. The Commission found that the merged entity will account for a relatively low market share in Gauteng and within the national market. The merged entity will remain relatively

small in Gauteng but the proposed transaction strengthens PathCare as the third major national pathology services provider. The Commission further found that the merging parties' laboratories/depots are located relatively far apart from each other with an extensive network of competitors' laboratories/depots in between.

8. With regard to coordinated effects assessment, the Commission found that the structure of the market is prone to coordination. There are high barriers to entry, low number of market participants and product homogeneity. The Commission further found that PathCare still remains relatively small in Gauteng than the other two major players and that together with the different cost structures of the players weakens the symmetry in the market. The Commission noted that the historical relationships between hospital groups and pathology laboratories appear intact and the merger will not change or strengthen this. Therefore the extent of the effects of the merger on the likelihood of coordination is unlikely to be significant. However, the Commission remains concerned about the historical relationships in place and that such relationships may be excluding smaller pathologists from gaining access to key hospital space and gaining market share in the pathology market.
9. Furthermore, the Commission found that the merging parties have not violated prior implementation in their agreement to sub-contract pathology services at the Midstream Hospital.
10. The Commission concludes that the proposed transaction is unlikely to substantially prevent or lessen competition in the market for the provision of pathology services to the private sector in Gauteng or the national market.
11. The proposed transaction does not raise any public interest concerns because it will not result in job losses. The Commission considered the Restraint of Trade agreement of the merging parties and found that the restraint of trade was overreaching as it covered geographic locations in which Vermaak was not active. Therefore, the Commission approves the proposed transaction with conditions in Annexure A, in terms of section 14(1)(b)(ii) of the Act, as amended.

**ANNEXURE A****Drs Dietrich, Voigt, Mia & Partners****and****Dr WJH Vermaak Incorporated****Case Number: 2015Dec0694****CONDITIONS****1 DEFINITIONS**

The following expressions shall bear the meanings assigned to them below and cognate expressions bear corresponding meanings:

- 1.1 **"Acquiring Firm"** means PathCare;
- 1.2 **"Act"** means the Competition Act 89 of 1998, as amended;
- 1.3 **"Approval Date"** means the date referred to on the Commission's merger clearance certificate (Form CC 15);
- 1.4 **"Business"** means the business carried out by Vermaak under the name and style of *"Vermaak and Partners Pathologists"* being the business of providing in and out of hospital pathology testing, and all activities ancillary thereto including providing insurance related and point of care pathology tests;
- 1.5 **"Business Day"** mean any day other than a Saturday, Sunday or official public holiday in the Republic of South Africa;
- 1.6 **"Business Services"** mean the services rendered by Vermaak in the ordinary course of its business of providing in and out of hospital, insurance-related and point of care pathology testing within the Territory;
- 1.7 **"Closing date"** means 5 (five) Business Days after the Implementation Date;
- 1.8 **"Commission"** means the Competition Commission of South Africa as established in terms of section 19 of the Act;
- 1.9 **"Conditions"** mean these conditions more fully described in clause 3 below;

- 1.10 “**Executive Consulting Agreement**” means certain agreements between the merging parties;
- 1.11 “**Implementation Date**” means the first Business Day of the month immediately following the month in which the Approval Date falls;
- 1.12 “**Initial Purchase**” means the acquisition of majority control in Vermaak;
- 1.13 “**Merger**” means the transaction notified to the Commission on 29 February 2016 under case number 2016Feb0066, in terms of which *inter alia* PathCare intends to acquire majority control in Vermaak;
- 1.14 “**Merging Parties**” means PathCare and Vermaak;
- 1.15 “**Option Purchase**” means the exercising of a call option by PathCare to purchase the remaining minority stake in Vermaak;
- 1.16 “**PathCare**” means Drs Dietrich, Voigt, Mia and Partners, a partnership carrying on business as pathologists;
- 1.17 “**Restraint Period**” means the period during which the Sellers are restrained from rendering Restricted Services;
- 1.18 “**Restraint of Trade**” means the restraint of trade in relation to the Restricted Business for the duration of the Restraint Period in the Territory;
- 1.19 “**Restricted Business**” means any Restricted business service rendered by the Sellers in competition with the Business Services;
- 1.20 “**Restricted Services**” mean any services which are rendered within the Territory in competition with the Business Services;
- 1.21 “**Sale of Shares and Claims Agreement**” means the Sale of Shares and Claims Agreement between the Merging Parties;
- 1.22 “**Sellers**” means the individuals who hold shares in Vermaak, the only shareholders in the Target Firm;
- 1.23 “**Target Firm**” means Vermaak;
- 1.24 “**Territory**” means each province within the Republic of South Africa and each magisterial district in the Republic of South Africa as contained in clauses 2.1.71 and 2.1.71.1 in the Sale of Shares and Claims Agreement; and
- 1.25 “**Vermaak**” means Dr WJH Vermaak Incorporated, the target firm.

## 2 RECORDAL

2.1 On 29 February 2016, the Merging Parties notified the Commission of the Merger between PathCare and Vermaak. Following its investigation, the Commission found that the Merger is unlikely to substantially prevent or lessen competition in the Gauteng provincial market in which Vermaak is currently present and in the national market where PathCare is present for the provision of pathology services to the private health sector. The Commission raised concerns relating to the Merging Parties' Option Purchase and the Restraint of Trade as set out in the Sale of Shares and Claims Agreement.

### Approval of Option Purchase

2.2 In terms of the Merger, PathCare intends to acquire majority control in Vermaak ("**Initial Purchase**"). In addition, PathCare will have a call option to purchase and the Sellers a put option to sell the remaining minority stake in Vermaak, after a stipulated period. However, there are certain trigger events which, if they occur, would entitle PathCare or the Sellers to exercise their call or put option, respectively, before the stipulated period.

2.3 The Merging Parties requested that the Commission currently approve both the Initial Purchase and the Option Purchase. However, the minority shareholding confers a form of control to the Sellers due to minority protections and hence the Merging Parties will have joint control over Vermaak, even though the Initial Purchase enables PathCare, the Acquiring firm, to "*cross the bright line*" as envisaged in section 12(2)(a) of the Act.

2.4 The Commission is of the view that the Option Purchase, if exercised, would constitute a separate notifiable merger transaction in that there will be a move from joint to sole control after the acquisition of the minority shareholding in Vermaak. PathCare would thereafter have unfettered control.

2.5 Nonetheless, the Commission assessed the proposed transaction as filed and is of the view that the stipulated period between the Initial Purchase and Option Purchase is significant in light of the case law which ordinarily proposes a period of 18 months within which merging parties may merely inform the Commission of a move from joint to sole

control. Therefore, a period longer than that, would warrant further investigation by the Commission. In this respect, the Commission recommends that the proposed transaction be approved subject to a Condition addressing this concern.

### **Restraint of trade**

2.6 PathCare and the Sellers have agreed to a Restraint of Trade in terms of which the Sellers will not directly or indirectly engage or have an interest in any Restricted Business, or entity carrying on any Restricted Business in the Territory for the duration of the Restraint Period.

2.7 The Commission considered the Restraint of Trade including its duration and scope. Following its investigation, the Commission found that the period of 24 months after termination of the Sellers' services on the target firm should be limited in terms of its geographic scope. In this regard, the Commission has concerns in relation to the Territory over which the Restraint of Trade is applicable. The Business of Vermaak is carried out in Pretoria, Ekurhuleni, Secunda and Bele-Bela. The Commission notes that the Territory of the Restraint of Trade encompasses the Republic of South Africa even though the services of the Business do not currently cover the entire Republic of South Africa. In this respect, the Commission recommends that the proposed transaction be approved subject to a Condition addressing this concern.

## **3 CONDITIONS**

3.1 In light of the above, the Commission approves this Merger subject to the Conditions as set out below:

- i. Should either of the Merging Parties exercise the Option Purchase (by agreement or in accordance with the current Option Purchase terms, including pursuant to the occurrence of a trigger event):
  1. Within 18 months of the Closing Date, the Merging Parties shall inform the Commission in writing within 10 (ten) Business Days of the exercise of the Option Purchase.

2. After a period of 18 months from the Closing Date, the Merging Parties shall notify the Commission of the exercise of the Option Purchase in the form of a merger filing in the requisite manner.
- ii. The Merging Parties agree that during the period of 24 (twenty-four) months after which the Sellers would have terminated their services from the target firm, the geographic scope of the Restraint of Trade will be limited to a 50-kilometre radius from each of the hospitals and depots in or from which the Business of Vermaak is currently carried out.

#### **4 MONITORING OF COMPLIANCE WITH THE CONDITION**

4.1 The Merging Parties shall:

- 4.1.1. Inform the Commission in writing of the Implementation Date, within 5 (five) Business Days of this coming into effect;
- 4.1.2. Submit an addendum to the Sale of Shares and Claims Agreement to reflect the amendments in 3.1.2 above within 10 (ten) Business Days of the Approval Date; and
- 4.1.3. Submit an affidavit attested to by a senior official attesting to any exercise as contemplated in 3.1.1.1, within 10 (ten) Business Days of such exercise.

4.2 The affidavit referred to in 4.1 shall be forwarded to [mergerconditions@compcom.co.za](mailto:mergerconditions@compcom.co.za).

#### **5 BREACH OF CONDITIONS**

In the event that the Merging Parties appear to have breached the above Conditions or if the Commission determines that there has been an apparent breach by the Merging Parties of any of the Conditions, this shall be dealt with in terms of Rule 39 of the Commission Rules.

Enquiries in this regard may be addressed to Manager: Mergers and Acquisitions Division at Private Bag X23, Lynnwood Ridge, 0040. Telephone: (012) 394 3298, or Facsimile: (012) 394 4298