

DEPARTMENT OF TRADE, INDUSTRY AND COMPETITION

NO. 967

1 October 2021

COMPETITION COMMISSION

NOTIFICATION TO APPROVE WITH CONDITIONS THE TRANSACTION INVOLVING:

ARRIE NEL PHARMACY PROPRIETARY LIMITED

AND

PHARMED PHARMACEUTICALS PROPRIETARY LIMITED

CASE NUMBER: 2020SEP0016

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 10 September 2020, the Competition Commission (the "Commission") received notice of an intermediate merger whereby Arrie Nel Pharmacy Proprietary Limited ("Arrie Nel") will acquire majority shareholding in Pharmed Pharmaceuticals Proprietary Limited ("Pharmed"). Post-merger, Pharmed will be solely controlled by Arrie Nel.
2. The primary acquiring firm, Arrie Nel, is duly incorporated in accordance with the laws of the Republic of South Africa. Arrie Nel is jointly controlled by individuals in their personal capacities comprising of; Johannes Arnoldus Nel, Johannes Metz van Wyk and Pieter Wouter du Toit. Arrie Nel and all the firms it controls will henceforth be referred to as the "Arrie Nel Group" or the "Acquiring Group".
3. The primary target firm, Pharmed, is duly incorporated in accordance with the laws of the Republic of South Africa. Pharmed is directly controlled by Imperial Logistics South Africa Group (Pty) Ltd ("Imperial Logistics"). The rest of the shares are owned by many other

shareholders. Imperial Logistics is also duly incorporated in accordance with the laws of the Republic of South Africa. Imperial Logistics is in turn, a wholly owned subsidiary of Imperial Holdings Limited (“Imperial Holdings”), a company publicly listed on the Johannesburg Stock Exchange. Imperial Holdings is therefore not controlled by a single shareholder as its shares are widely held. Pharmed controls a few firms. Pharmed and its subsidiaries will henceforth be collectively referred to as “Pharmed” or the “Target Firm”.

4. The Acquiring Group will acquire Imperial Logistics’ majority shareholding in Pharmed. Following implementation of the transaction, Pharmed will be controlled by the Acquiring Group.

Activities of the merging parties

5. The Acquiring Group is a vertically integrated pharmaceutical wholesaler and retailer. The Acquiring Group wholesales pharmaceutical products to its many retail pharmacies as well as to the open market (i.e. independent pharmacies, medical professionals). Pharmed is a wholesale distributor of pharmaceutical products to independent pharmacies, hospitals and doctors.
6. The activities of the merging parties overlap horizontally as both are active in the wholesale distribution of pharmaceuticals. The activities of the merging parties further overlap vertically because the Acquiring Group and Pharmed are active at different levels of the pharmaceutical value chain (i.e. the Acquiring Group is involved in retail pharmacies whilst Pharmed is a wholesaler.)

Market Definition and competitive assessment

7. In line with the approach by the Competition Tribunal (“Tribunal”), the Commission assessed the upstream national market for the wholesale distribution of pharmaceuticals and the downstream national market for the retail of scheduled and unscheduled pharmaceuticals.
8. The Commission found that the merged entity will account for very little of the upstream national market for the wholesale distribution of pharmaceuticals, with a low market share

accretion. The merged entity will continue to face competition from other market players such as CJ Distributors (Dis-chem), UPD (Clicks) and Alpha Pharm. The Commission is of the view that the merger is unlikely to raise any competition concerns in the upstream market.

9. The merger will not result in any market share accretion in the downstream national market for the retail of scheduled and unscheduled pharmaceuticals. The Commission found that the merged entity accounts for a low market share of both the retail of scheduled and unscheduled pharmaceuticals, respectively. The merged entity will continue to face competition from Dis-Chem, Clicks, Medirite and independent pharmacies. The Commission further notes that the merged entity will be vertically integrated similar to most its competitors such as Dis-Chem, Clicks, Alpha Pharm, Medirite and Pharmacy at SPAR, who are vertically integrated.

Vertical assessment

10. As indicated in the market share assessment above, the merging parties do not command significant market shares, thus neither anticompetitive input nor customer foreclosure is likely to result from the proposed merger.

Coordinated effects assessment

11. The Commission assessed whether the merger promotes the ability of coordination to take place post-merger. Given that the merged entity commands insignificant market shares and the upstream and downstream markets have many participants, the merger is unlikely to enhance coordination.

Third party concerns and creeping mergers

12. Although some market participants raised concerns, the Commission found that the merged entity do not account for significant market shares in both levels of the pharmaceuticals value chain and that the proposed transaction is unlikely to result in the substantial prevention or lessening of competition in the defined markets.
13. The Commission conducted a creeping merger assessment and found that despite several acquisitions over the last three years, the merger is unlikely to result in a substantial

lessening or prevention of competition in any relevant market/s.

14. In view of the foregoing, the Commission found that the merged entity is still small in both the upstream and the downstream markets.

Public interest considerations

15. The Commission's assessment found that Pharmed was under some financial strain. Thus, the Commission is of the view that the retrenchments of some of the Employees of the merged entity are not merger specific.
16. However, to address further employment concerns, the merging parties and the Commission have agreed to employment conditions contained in Annexure A hereto.
17. The proposed transaction does not raise any other public interest issues.

Conclusion

18. Considering the above, the Commission approves the merger in terms of the Conditions contained in **Annexure A**.

ANNEXURE A**ARRIE NEL PHARMACY PROPRIETARY LIMITED****AND****PHARMED PHARMACEUTICALS PROPRIETARY LIMITED****CASE NUMBER: 2020SEP0016**

CONDITIONS

1. DEFINITIONS

- 1.1. **“Acquiring Group”** means the primary acquiring firm, being Arrie Nel Pharmacy Group (Pty) Ltd, a company which is incorporated in terms of the laws of South Africa and has its principal place of business at 433 34th Lane, Villieria, Pretoria, Gauteng, South Africa.;
- 1.2. **“Act”** means the Competition Act 89 of 1998, as amended;
- 1.3. **“Affected Employees”** means any employee of Pharmed Pharmaceuticals (Pty) Ltd and Imperial Health Sciences who will be retrenched for operational reasons;
- 1.4. **“Approval Date”** means the date referred to on the Commission’s merger Clearance Certificate;
- 1.5. **“Commissioner”** means the Competition Commissioner of South Africa, appointed in terms of section 22 of the Competition Act;

- 1.6. **“Commission”** means the Competition Commission of South Africa;
- 1.7. **“Competition Act”** means the Competition Act 89 of 1998, as amended;
- 1.8. **“Commission Rules”** means the Rules for the Conduct of Proceedings;
- 1.9. **“Days”** mean business days, being any day other than a Saturday, Sunday or official public holiday in the Republic of South Africa;
- 1.10. **“Implementation Date”** means the date, occurring after the Approval Date, on which the Merger is implemented by the Merging Parties;
- 1.11. **“LRA”** means the Labour Relations Act 66 of 1995 as amended;
- 1.12. **“Merger”** means the cession by the Seller of the business of the Target Firm to the Acquiring Firm;
- 1.13. **“Merged Entity”** means the entity that will exist after the implementation of the Merger;
- 1.14. **“Merging Parties”** means the Acquiring Group, the Target Firm and the Seller;
- 1.15. **“Minister”** means the Minister of Trade, Industry and Competition;
- 1.16. **“Moratorium”** means a period of three (3) years from the Implementation Date;
- 1.17. **“Pharmed”** means Pharmed Pharmaceuticals (Pty) Ltd, incorporated in terms of the laws of South Africa and has its principal place of business at 31 Imvubu Park Close, River Horse Valley, Umhlanga, KwaZulu-Natal, South Africa;
- 1.18. **“Retained Employees”** means the minimum number of Transferring Employees that the Acquiring Group is obliged to retain post the implementation of the Merger for the duration of the Moratorium;
- 1.19. **“Seller”** means Imperial Logistics South Africa Group (Pty) Ltd, which is incorporated in terms of the laws of South Africa and has its principal place of business at Imperial Logistics Place, 79 Boeing Road East, Bedfordview, Gauteng, South Africa;

- 1.20. **“South Africa”** means the Republic of South Africa;
- 1.21. **“Target Firm”** means the primary target firm, being Pharmed;
- 1.22. **“The Transaction”** means the merger in terms of which Arrie Nel will acquire control over the business of Pharmed;
- 1.23. **“Transferring Employees”** means the employees who will transfer from Pharmed to the Acquiring Group, pursuant to section 197 of the LRA, on the Implementation Date. The Transferring Employees will be selected by the Acquiring Group in consultation with their unions, having regard to employees with critical skills, qualification and experience. However, the Acquiring Group will only retain the Retained Employees; and
- 1.24. **“Tribunal”** means the Competition Tribunal of South Africa.

2. RECORDAL

- 2.1. On 10 September 2020, the Merger Parties filed the Merger.
- 2.2. The Commission found that the merger is unlikely to result in any substantial lessening or prevention of competition in any relevant market/s.
- 2.3. The Commission found that the retrenchment of any Affected Employees Pre-Merger is unlikely to be related to the Merger. However, the Merger Parties have agreed that the Merger will facilitate the transfer of the Transferring Employees to the Merged Entity, in terms of section 197 of the LRA and save a substantial number of jobs.
- 2.4. The Minister has participated in the Merger and proposed that the Merging Parties consider offering any Affected Employees preference for any vacancies that may arise at the Merged Entity post-Merger to mitigate job losses.
- 2.5. The Merger Parties and the Commission have agreed to these Conditions to address any public interest concerns arising from the Merger.

3. CONDITIONS TO THE APPROVAL OF THE MERGER

Employment

- 3.1. The Transferring Employees will transfer to the Acquiring Group on the Implementation Date.
- 3.2. The Merged Entity will retain the Retained Employees for the duration of the Moratorium period.
- 3.3. The Merged Entity shall not retrench any employees because of the Merger during the Moratorium. For the sake of clarity, retrenchments exclude (i) voluntary separation arrangements; or (ii) voluntary early retirement packages, (iii) unreasonable refusals to be redeployed in accordance with the provisions of the LRA; (iv) resignations or retirements in the ordinary course of business; (v) retrenchments lawfully effected for operational requirements unrelated to the Merger; (vi) terminations in the ordinary course of business, excluding but not limited to, dismissals as a result of misconduct or poor performance; (vii) any decision not to renew or extend a contract of a contract worker; and (viii) any transfer of employees to the employment of a third party as a result of any sale of business operations, including related assets and liabilities, or any joint venture or similar business arrangements.

Preference to the Affected Employees

- 3.4. For a considerable number of months from the implementation of the Merger, the Merged Entity and the Seller will give preference to their respective former employees who form part of the Affected Employees in relation to vacancies that become available within their respective operations, subject to the respective Affected Employees having the requisite qualifications, skills and experience and meeting the requirements for such positions (in the sole discretion of the Merged Entity and the Seller respectively).
- 3.5. The Merged Entity and the Seller (or their relevant subsidiary) will publish a communicate via SMS to the last known cellphone number and/or email at the last known email address to all the Affected Employees, providing them with the information and details of the position as well as contact details as to whom to contact within the relevant Human Resources department to enable them to apply, should they wish to do so. Under all circumstances the onus will rest on the Affected Employees to apply for a vacant position.

- 3.6. Should any Affected Employee meet the relevant criteria and job requirements in terms of qualification, experience and skills required (in the sole discretion of either the Acquiring Firm or the Seller), the application will be facilitated through the relevant Human Resources Department. Such appointments will occur on standard terms of employment, at the time, for those positions.
- 3.7. In the event that two equally qualified and skilled individuals apply for a position, one being an Affected Employee and one being an external applicant, the Merged Entity or the Seller will give preference to the Affected Employee, subject to employment and other legislation and the existing labour law practices of either the Acquiring Firm or the Seller. In the event that there are two or more Affected Employees who apply for the same position, the Merged Entity or the Seller may select one of them in its sole discretion, subject to employment and other legislation and the existing labour law practices.

4. MONITORING OF COMPLIANCE WITH THE CONDITIONS

- 4.1. The Merging Parties shall each circulate a copy of the Conditions to all their employees within 5 (five) Business Days of the Approval Date.
- 4.2. As proof of compliance with 4.1 above, a director of each Merger Party shall within 10 (ten) Business Days of circulating the Conditions, submit to the Commission an affidavit attesting to the circulation of the Conditions and provide a copy of the notice that was sent to the employees in that regard.
- 4.3. The Acquiring Group shall inform the Commission in writing of the Implementation Date within 5 (five) Business Days of its occurrence.
- 4.4. Each of the Acquiring Group and the Seller shall, on each anniversary of the Implementation Date, during the period referred to in **Error! Reference source not found.** to 3.8 above submit an affidavit confirming compliance with the conditions; 3.1 to 3.8 above for the duration of the Moratorium.
- 4.5. In the event that the Commission receives any complaint in relation to non-compliance with the above Conditions, or otherwise determines that there has been an apparent

breach by the Merging Parties of these Conditions, the breach shall be dealt with in terms of Rule 39 of the Rules read together with Rule 37 of the Competition Tribunal Rules.

5. VARIATION

- 5.1. The Merged Entity may at any time, and on good cause shown, apply to the Commission for any of the Conditions to be waived, relaxed, modified and/or substituted. Should a dispute arise in relation to the Merged Entity's application to the Commission, the Merged Entity may apply to the Tribunal for appropriate relief.

6. GENERAL

- 6.1. All correspondence in relation these conditions must be submitted to the following email address: mergerconditions@compcom.co.za and ministry@thedtic.gov.za.

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