

DEPARTMENT OF TRADE, INDUSTRY AND COMPETITION

NO. 1835

4 March 2022

NOTIFICATION TO APPROVE WITH CONDITIONS THE TRANSACTION INVOLVING:**VOLARIS GROUP INC****AND****ADAPT IT HOLDINGS LIMITED****CASE NUMBER: 2021JUL0046**

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 abovementioned firms subject to conditions as set out below:

Background

1. On 20 July 2021, the Competition Commission ("Commission") received notice of an intermediate merger whereby Volaris Group Inc. ("Volaris") intends to acquire the entire ordinary issued share capital in Adapt IT Holdings Limited ("Adapt It"). Post-merger, Adapt IT will be solely controlled by Volaris.

Description of the merging parties

2. The primary acquiring firm, Volaris, is duly incorporated in accordance with the laws of Ontario, Canada. Volaris is controlled by Constellation Software Inc. ("Constellation"), also incorporated under Canadian laws. Constellation is listed on the Toronto Stock Exchange and as its shares are widely held, it is not directly or indirectly controlled by any firm or individual. Constellation controls several firms within South Africa. Volaris, Constellation and its subsidiaries will henceforth be collectively referred to as the "Acquiring Group".
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3. The primary target firm, Adapt IT, is duly incorporated in accordance with the laws of the Republic of South Africa. Adapt IT is listed on the Johannesburg Securities Exchange and as its shares are widely held, it is not directly or indirectly controlled by any firm or individual. However, for the sake of completeness, shareholders owning at least 5% of the entire issued share capital in Adapt IT are: Sibusiso Shabalala; as to 9.88%, UBS AG LDN A/C Client; as to 5.71% and Adapt IT Pty Ltd; as to 5.26%. Adapt IT controls a few firms operating within South Africa. Adapt IT and its subsidiaries will henceforth be collectively referred to as the "Target Group".

Description of the transaction

4. In terms of the proposed transaction, the Acquiring Group intends to acquire the entire ordinary issued share capital in the Target Group, by way of a scheme of arrangement ("Scheme"). In terms of the Scheme, the Target Group's shareholders ("Shareholders") are given a choice to (i) sell all or part of their shares to Volaris ("Exit Election") or (ii) retain all or part of their shares ("Continuation Election"). However, Shareholders will be deemed to have made the Exit Election in respect of all shares for which a valid Continuation Election has not been made.
5. Contemporaneously with the Scheme, the Acquiring Group has made a conditional general standby offer ("Standby Offer") to all Shareholders, to acquire up to the entire issued share capital in the Target Group for the Standby Offer Consideration which will be implemented only if the Scheme fails.
6. Based on the foregoing, pursuant to the successful implementation of the Scheme or, if the Scheme fails, pursuant to the Standby Offer being implemented, the entire issued share capital in the Target Group may be delisted from the JSE. Post-merger, the Target Group will be solely controlled by the Acquiring Group.

Activities of the merging parties

7. The Acquiring Group provides vertical market software services primarily focusing on (1) education, (2) manufacturing and (3) telecommunications. Vertical market software services
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providers offer solutions to markets such as banks, educational institutions, mines, car dealerships, etc.

8. The Target Group provides specialised software and digitally led business solutions in 6 (six) key sectors, namely (1) education, (2) manufacturing, (3) communication, (4) hospitality, (5) energy and (6) financial services.

Overlapping markets

9. The Commission considered the activities of the merging parties and found that they do not overlap horizontally as they do not offer products or services that can be regarded as interchangeable in any of the markets. The Commission further found that although the Acquiring Group and the Target Group are involved in the provision of vertical software solutions that focus on (1) education, (2) communication/telecoms and (3) manufacturing, the type of software solutions offered by each of them to each industry is differentiated to such an extent that they are not considered to be reasonably interchangeable, as explained below.

Competition assessment

10. The Commission found that although the merging parties focus on 3 similar sectors, each one targets a market which is distinct from the one targeted by the other one.
 11. The submissions by the customers of the merging parties also confirm that the merging parties are not each other's direct competitor. The customers submitted that the merging parties are not able to offer similar software solutions. None of these customers had both the merging parties bid against each other when procuring software solutions obtained from either of the merging parties. Further, none of these customers raised any competition concerns.
 12. In view of the foregoing, the Commission concludes that the proposed transaction is unlikely to lead to a substantial prevention or lessening of competition in any relevant markets.
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Public interest considerations**Employment**

13. The merging parties submitted that the proposed transaction will not have adverse effects on employment as it will not result in merger-related job losses or retrenchments.
14. The Commission is of the view that the proposed transaction is unlikely to lead to negative employment effects as their operations will not be merged, which would unlikely lead to duplication roles and possibly retrenchments and none of the employee representatives raised a concern.

Effect on B-BBEE and the spread of ownership by historically disadvantaged persons

15. As context, the Commission notes that final shareholding of Volaris in Adapt IT is not yet known. This will only be known after all shareholders have indicated whether they will accept Volaris's offer. Although Volaris has expressed a firm intent to obtain up to 100% of the issued shares of Adapt IT, its final shareholding depends on how many shareholders elect to exit. Consequently, it is difficult to estimate what Volaris's stake in Adapt IT will be and, specifically, what the post-merger broad-based black economic empowerment ("B-BBEE") shareholding of the merged entity will be.
 16. The merging parties submitted that given that all the Target Group's Shareholders, including historically disadvantaged persons ("HDPs") are entitled to make the Exit Election and the Continuation Election in terms of the proposed transaction, it is not possible to determine the impact of the proposed transaction on post-merger level of HDP ownership prior to the implementation of the proposed transaction.
 17. Given the uncertainty about the effect of the merger on B-BBEE, the parties have estimated the change in BEE ownership on a 'worst-case' basis.
 18. Prior to the merger, the economic interest held by historically disadvantaged persons (HDPs) amount to 29% while their ownership level is estimated at 31%. If all HDP
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shareholders exit, Adapt IT can still claim recognition for some of the historical HDP ownership in terms of the 'Continued Recognition Principle' in the IT Sector B-BBEE Code ("IT Sector Code"). The ICT Sector Code entitles an IT firm such as Adapt IT to recognise a portion of black ownership after HDP shareholders have exited an IT firm through a sale of shares. In this regard, if the Continued Recognition principle is applied on a worst-case scenario, Adapt IT can claim a stipulated amount of Black Ownership, or simply, Continued Recognition ("CR") Ownership. The post-merger HDP ownership will thus be between 10% and 15%. The merging parties however reiterate that this is a worst-case scenario as it assumes all HDP shareholders will elect to exit. Any HDP shareholders who elects to retain part, or all of their shares will raise the total level of B-BBEE ownership in Adapt IT to more than this figure.

19. The merging parties further submitted that the Acquiring Group commits to maintaining Adapt IT's current BEE rating for a period of 60 months after the implementation date. Therefore, should the BEE level drop below the current level, the Acquiring Group will rectify that within 12 months. Should this commitment require the implementation of a new BEE ownership deal, the dilutive impact of the B-BBEE ownership will be shared equally by all the remaining Shareholders.
20. The Minister of Trade, Industry and Competition ("Minister") also issued Notice of Intention to Participate in the investigation ("CC5(2)"). In the submission, the Minister focused on the undertakings by the merging parties to also include black employees and women in the ownership of the Target Group, in maintaining the pre-merger level of B-BBEE ownership. The Minister proposed the introduction of an employee share ownership programme ("ESOP") within the Target Group of 5%, as a mechanism to be utilised for the maintenance of the pre-merger B-BBEE level.

Proposed Education/Ownership Trust and B-BEE rating Commitments

21. Instead of establishing ESOP, the merging parties submit that they will establish an Education Trust which would own approximately 5.55 million ordinary shares in Adapt IT. This would be equivalent to an effective 5% of the shares in Adapt IT. The Trust is
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earmarked to provide educational and skill development bursaries for all employees of Adapt IT, their families, and broader communities within which Adapt IT operates. The Minister considered the merging parties proposal of an Education Trust and raised no further concerns.

22. In summary, the merger parties proposed the following to address the potential HDP dilution effects of the merger:

- 22.1. An Education Trust will be established within 12 months of implementation that will hold 5% of the issued share capital of Adapt IT. This Trust will be governed by Adapt IT and worker representatives. The beneficiaries of the Trust will be Adapt IT workers. The benefits/dividends that flow to the Trust will only be applied to education programmes. In other words, the Trust will not pay dividends to employees, but all dividends will be available to employees, their families, and communities in which Adapt IT operates to apply for funding for any course of study. Once a course of study is approved, the payment for that course will endure whether the employee remains employed in Adapt IT. Because the Education Trust owns 5% of Adapt IT's issued share capital, it contributes to the Black Ownership element under the relevant B-BBEE codes. 85% of the Education Trust is ring-fenced, such that the pay outs will be reserved for employees.
 - 22.2. A B-BBEE Ownership ranging between 10% and 15% (CR Ownership) as well as 5% (Education Trust) shareholdings, bringing these to a total ranging between 15% and 20% of B-BBEE ownership in Adapt IT. Should a level of 20% not be achieved, the merging parties, following further engagements, offered a new commitment which effectively improves the total HDP ownership proposal to 20%, in terms of economic interest, as a measure to address the dilutive nature of the proposed transaction.
 - 22.3. Maintain the pre-merger level of B-BBEE rating for at least 5 years after the implementation of the merger. Should Adapt IT's B-BBEE rating level drop below the pre-merger level at any time, this would be rectified within one year of this change.
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23. In all, the Commission's view is that the 5% Education Trust, plus the additional stipulated percentage of HDP ownership in the Target Group would serve as an initial endeavour towards correcting the dilutive nature of the proposed transaction. The Commission is of the view that the actual final level of the Target Group's B-BBEE ownership may be higher considering that other HDP shareholders may elect to retain part or all of their shares. As the current calculations are based on a worst-case scenario assuming that all HDP shareholding shall be exited, any HDP shareholding that is retained is likely to raise the proposed level.

24. The Commission has accepted the suite of commitments above as reasonable endeavours to address the dilutive effective of proposed merger on its effect on HDPs. These commitments are contained in the form of Conditions in Annexure A to the report.

Conclusion

25. The Commission approves the proposed merger subject to the conditions in **Annexure A**.

ANNEXURE A**VOLARIS GROUP INC****AND****ADAPT IT HOLDINGS LIMITED****CASE NUMBER: 2021JUL0046**

CONDITIONS

1. DEFINITIONS

1.1. The following expressions shall bear the meanings assigned to them below and cognate expressions bear corresponding meanings –

- 1.1. **"Acquiring Group"** means Volaris and its controlling shareholder and all firms controlled by them;
 - 1.2. **"Adapt IT"** means Adapt IT Holdings Limited;
 - 1.3. **"B-BBEE"** means broad-based black economic empowerment as defined in the B-BBEE Act;
 - 1.4. **"B-BBEE Act"** means the Broad-Based Black Economic Empowerment Act, 53 of 2003, as amended;
 - 1.5. **"B-BBEE Education Trust"** means the trust to be established by the Merged Entity as set out in clause 3 below;
 - 1.6. **"B-BBEE ICT Sector Code"** means the Amended B-BBEE ICT Sector Code published in the Government Gazette on 7 November 2016;
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- 1.7. **"B-BBEE Rating Commitment"** means the commitment set out in clause 5 below;
- 1.8. **"Black"** means black people as defined in the B-BBEE Act;
- 1.9. **"Close Family Member"** means the spouse, children, brother, sister, mother, father, sister's children, and brother's children of the beneficiaries of the B-BBEE Education Trust that may be dependent on him or her;
- 1.10. **"Commission"** means the Competition Commission of South Africa, a statutory body established in terms of section 19 of the Competition Act;
- 1.11. **"Competition Act"** means the Competition Act, 89 of 1998, as amended;
- 1.12. **"Conditions"** means these conditions;
- 1.13. **"Days"** means any calendar day which is not a Saturday, Sunday, or official public holiday in South Africa;
- 1.14. **"DTIC"** means the Department of Trade, Industry, and Competition of South Africa;
- 1.15. **"Implementation Date"** means the date, occurring after the receipt of 2021 Certificate, and after the last condition precedent to the transaction is fulfilled or waived when the Merger is implemented in accordance with its terms;
- 1.16. **"Initial Period"** means 2 (two) years from the Implementation Date,
- 1.17. **"Merged Entity"** means Adapt IT subject to the control of Volaris following implementation of the Merger;
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- 1.18. **“Merger”** means the acquisition of control by Volaris of Adapt IT as contemplated in the intermediate merger notified to the Commission under Commission Case Number 2021JUL0046;
- 1.19. **“Merging Parties”** means Adapt IT and Volaris;
- 1.20. **“South Africa”** means the Republic of South Africa;
- 1.21. **“Tribunal”** means the Competition Tribunal of South Africa, a statutory body established in terms of section 26 of the Competition Act; and
- 1.22. **“Volaris”** means Volaris Group Inc.
- 1.23. **“2021 Certificate”** means Adapt IT’s B-BBEE Certificate which will be received by the Merging Parties on or before 30 September 2021.

2. RECORDAL

- 2.1. On 20 July 2021, the Commission received notice of the Merger.
- 2.2. Pursuant to its investigation of the Merger, the Commission found, from a competition perspective, that it is unlikely to lessen or prevent competition.
- 2.3. However, the Commission found that the Merger may have a negative effect on the promotion of a greater spread of ownership, as contemplated in section 12A(3)(e) of the Competition Act.
- 2.4. In good faith negotiations with the Commission and the DTIC, the Merging Parties agreed to the conditions below.

3. B-BBEE EDUCATION TRUST

- 3.1. Within 12 (twelve) months of the Implementation Date, the Merged Entity will establish the B-BBEE Education Trust, the main parameters of which shall be:
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- 3.1.1. the B-BBEE Education Trust will own approximately 5.55 million Adapt IT ordinary shares, equating to an effective 5% Black ownership of Adapt IT's issued ordinary shares (calculated in terms of the B-BBEE ICT Sector Code and by excluding shareholding attributable to foreign operations);
- 3.1.2. funding provided by the B-BBEE Education Trust will be ring-fenced for education use, in the form of educational and skills development bursaries;
- 3.1.3. between 85% - 100% of funding provided by the B-BBEE Education Trust will be ring-fenced for only Adapt IT employees and their dependants or Close Family Member, who will be the beneficiaries of the B-BBEE Education Trust;
- 3.1.4. all Adapt IT employees will be able to apply for educational funding, in terms of transparent and fair criteria;
- 3.1.5. no lawful recipient of educational funding/beneficiary of the B-BBEE Education Trust will be obliged to repay same; and
- 3.1.6. the B-BBEE Education Trust will be administered in terms of a trust deed by a board of trustees, which will include employee representation and independent trustees.

4. B-BBEE COMMITMENT

- 4.1. Within 12 (twelve) months of the Implementation Date, the Merged Entity shall ensure that the derived Black shareholding in Adapt IT (calculated in terms of the current B-BBEE ICT Sector Code and by excluding shareholding attributable to foreign operations), in terms of economic interest, will be at least **[Confidential]**%.
 - 4.2. It is recorded that this can be achieved by an effective derived Black ownership which is estimated at a **[Confidential]** in Adapt IT through the application of the continued recognition principle in terms of the current B-BBEE ICT Sector Code (estimate is dependent on the number of Black shareholders that elect to sell their
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shares in terms of the Merger) and a further 5% effective Black ownership through the establishment of the B-BBEE Education Trust.

- 4.3. Within the Initial Period, the Merged Entity shall ensure that the derived Black shareholding in Adapt IT (calculated in terms of the current B-BBEE ICT Sector Code and by excluding shareholding attributable to foreign operations), in terms of economic interest, will be at least **[Confidential]**. If, at the end of the Initial Period, the Merged Entity has been unable to comply with the aforesaid commitment, then the Merged Entity shall engage with the Commission in order to extend such period by a further year with the written consent of the Commission, which shall not be unreasonably withheld.
- 4.4. This B-BBEE Commitment is subject, at all times, to Volaris maintaining control over Adapt IT, as contemplated by the Competition Act and a shareholding in Adapt IT of at least 50.1%.

5. B-BBEE RATING COMMITMENT

- 5.1. The Merged Entity shall use all reasonable endeavours to ensure that Adapt IT and its main operating subsidiary will maintain their current B-BBEE ratings or only one level lower for a period of 5 (five) years after the Implementation Date, as measured in terms of the current B-BBEE Act and B-BBEE ICT Sector Code.
- 5.2. The current B-BBEE rating of Adapt IT or its main operating subsidiary shall be the B-BBEE rating at the receipt of 2021 Certificate.
- 5.3. To the extent that the B-BBEE rating of Adapt IT or its main operating subsidiary falls by one level vis-à-vis the level immediately prior to the receipt of 2021 Certificate, the Merged Entity commits to rectify same within a 12 (twelve) month period, until expiry of this B-BBEE Rating Commitment.
- 5.4. This B-BBEE Rating Commitment is subject, at all times, to Volaris maintaining control over Adapt IT as contemplated by the Competition Act and a shareholding in Adapt IT of at least 50.1% and is subject to the B-BBEE rating being measured in terms of the current B-BBEE Act read with the B-BBEE ICT Sector Code.
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6. MONITORING OF COMPLIANCE WITH THE CONDITIONS

- 6.1. The Acquiring Group shall inform the Commission of the Implementation Date within 5 (five) Days of its occurrence.
- 6.2. The Acquiring Group shall inform the Commission of the commencement date of the B-BBEE Education Trust contemplated in clause 3 above within 5 (five) Days of its occurrence.
- 6.3. The Merging Parties shall inform the Commission of Adapt IT's B-BBEE rating 20 days within the receipt of the 2021 Certificate. This notification shall include a certificate or report from an accredited independent B-BBEE rating agency verifying Adapt IT's B-BBEE rating.
- 6.4. For a period of 5 (five) years from the receipt of 2021 Certificate, the Acquiring Group shall, within 30 (thirty) Days of each anniversary of the 2021 Certificate, provide to the Commission a report detailing its compliance with these Conditions. This report shall be accompanied by an affidavit, attested to by a senior official of the Merged Entity, confirming the accuracy of the report.
- 6.5. Any person who believes that the Merging Parties have failed to comply with these Conditions may approach the Commission with his/her complaint. In the event that the Commission determines that there has been an apparent breach by the Merging Parties of these Conditions, the matter shall be dealt with in terms of clause 8 below.

7. VARIATION OF THE CONDITION

- 7.1. 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.
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8. APPARENT BREACH

8.1. In the event that the Merging Parties appear to have breached the 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 Rules for the Conduct of Proceedings in the Commission read together with Rule 37 of the Rules for the Conduct of Proceedings in the Tribunal.

1.1.1. GENERAL

1.2. All correspondence in relation to these Conditions must be submitted to the following e-mail address: mergerconditions@compcom.co.za and Ministry@thedtic.gov.za.

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