

DEPARTMENT OF ECONOMIC DEVELOPMENT

NO. 2259

8 July 2022

COMPETITION COMMISSION

NOTIFICATION TO APPROVE WITH CONDITIONS THE TRANSACTION INVOLVING:

SMG WESTERN CAPE (PTY) LTD AND THE MCCARTHY FAMILY TRADING HOLDCO
(PTY) LTD

AND

AURIC AUTO PROPRIETARY LIMITED

CASE NUMBER: 2021SEP0030

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:

1. On 15 September 2021, the Competition Commission (the "Commission") received notice of an intermediate merger whereby SMG Western Cape (Pty) Ltd ("SMG WC") and The McCarthy Family Trading Holdco (Pty) Ltd ("SMG Holdco") intend to acquire BMW Constantia Agency ("BMW Constantia"), BMW Cape Town Agency ("BMW Cape Town") and the BMW Auto Atlantic ARC from Auric Auto (Pty) Ltd ("Auric Auto"). BMW Constantia, BMW Cape Town and the BMW Auto Atlantic ARC are collectively referred to as the "Target Firms".
2. In terms of the proposed transaction, SMG WC will acquire the Target Firms from Auric Auto. As part of this transaction, SMG Holdco will also enter into a management agreement with SMG WC in terms of which SMG WC will be managed by SMG Holdco. Thus, in terms of the management agreement, SMG Holdco will also acquire control of the Target Firms in terms of section 12(2)(g) of the Competition Act.

3. The primary acquiring firms are: (i) SMG WC, and (ii) SMG Holdco, a private company incorporated in South Africa.
4. SMG WC does not control any firm. SMG WC is controlled by McCarthy Investments GBC 1 ("McCarthy Investments"). McCarthy Investments is in turn controlled by the McCarthy Family Foundation ("McCarthy Foundation"). The McCarthy Foundation is not controlled by any firm.
5. SMG Holdco is controlled by the Sean McCarthy Trust ("McCarthy Trust"). SMG Holdco controls several firms including the following: (i) SMG Value Added Services (Pty) Ltd; (ii) SMG Services (Pty) Ltd; (iii) Bidvest 6 (Pty) Ltd; (iv) SMG Ballito (Pty) Ltd; and SMG Durban (Pty) Ltd.
6. SMG WC and SMG Holdco and all the firms directly or indirectly controlling them, and all the firms controlled by SMG Holdco, shall be referred to as the "Acquiring Group".
7. The Acquiring Group operates BMW, BMW Motorrad, MINI, Jaguar, Land Rover, Toyota and Lexus branded dealerships or agencies across KwaZulu Natal and Cape Town. These dealerships/agencies also offer after-sales services and after-sales branded OEM parts and accessories.
8. The primary target firms consist of the following: (i) BMW Constantia, (ii) BMW Cape Town and (iii) Auto Atlantic ARC ("Target Firms"). The Target Firms are wholly owned by Auric Auto.
9. BMW Constantia and BMW Cape Town are dealerships or agencies for new BMW/MINI vehicles. They also sell used vehicles and provide aftersales services. Auto Atlantic ARC is a BMW/MINI approved repair Centre. All the Target Firms are based in Western Cape.

Relationship between the parties / products (horizontal/vertical)

10. The Commission assessed the proposed merger in the following markets:

- 10.1. The narrow market for the retail of new passenger vehicles within the Cape Town Metropolitan areas.
- 10.2. National market for the sale of used passenger vehicles.
- 10.3. The provision of after-sale servicing/maintenance work for BMW and MINI vehicles that are in warranty or motor plan.
- 10.4. The provision of after-sale servicing/maintenance work for BMW and MINI branded vehicles that are out of warranty or motor plan.
- 10.5. Supply of after-sale spare parts for BMW and MINI branded vehicles that are still in warranty or motor plan.
- 10.6. Supply of after-sale spare parts for BMW and MINI branded vehicles that are out of warranty or motor plan.
- 10.7. Provision of accident repair services (body repair work) for BMW and MINI branded vehicles in Cape Town.

Assessment of the market for the retail and supply of new passenger vehicles

11. The Commission considered the effect of the merger on both inter-brand competition and intra-brand competition.

Inter-brand competition

12. The Commission found that the merging parties will have a combined market share of [0 - 10%] post-merger in the retail of new passenger vehicles in the Cape Town area. The market shares are based on data from an August 2020 – July 2021 Lightstone Auto Report.
13. The Commission is therefore of the view that the proposed transaction is unlikely to substantially prevent or lessen inter-brand competition as the combined post-merger market share of the merging parties remains low.

Intra-brand competition

14. The Commission found that the merging parties will have significant market shares [above 45%] in the Cape Town Area. Given the high market share enjoyed by the merging parties in the retail of BMW branded vehicles, the Commission assessed the possible unilateral effects

relating to the supply of BMW branded vehicles, provision of after-sale service/maintenance and parts.

Unilateral effects assessment relating to the supply of new and used BMW and MINI branded vehicles in Cape Town

15. The Commission found that the ability of the merged entity to unilaterally increase prices of new and used BMW branded passenger vehicles is constrained by the BMW sales model. The Commission understands that BMW dealerships do not determine prices for vehicles or sell cars directly to customers. Instead, all sales of new and used BMW and MINI branded vehicles are concluded directly between BMW SA and the customer. When BMW SA sells a new or used BMW vehicle, the customer chooses a BMW agent to deliver that vehicle to the customer and BMW SA instructs that BMW agent to deliver the vehicle to the customer at a fixed fee. The fixed fee is paid to the agent by BMW SA.
16. Considering the above, the Commission finds that the proposed transaction is unlikely to result in unilateral price increases as the prices of new and used BMW and MINI branded vehicles are determined by BMW SA and not by the dealership. Therefore, BMW agents do not compete on prices as far as the retail of new and used BMW and MINI branded vehicles are concerned. Furthermore, the Commission finds that the fee that is payable to BMW dealers or agents is fixed and is determined by BMW SA and that dealership or agents cannot unilaterally demand higher delivery fees.

Assessment of unilateral effects relating to provision of after-sale services or maintenance work and supply of spare parts during warranty

17. The Acquiring Group estimates that a significant number of customers who bought new vehicles over the past 3 years returned to the selling dealer agent to service the vehicle. The Target Firms also indicated that a significant number of new vehicles sold by the Auric Auto Group are retained to perform services and or maintenance. Given that the merging parties will be the single largest dealership group for BMW and MINI branded vehicles in Cape Town and the fact that most of the customers return to service their cars from the selling dealership,

the Commission assessed if the merging parties will be able to unilaterally increase the prices of after-sale service/maintenance and spare parts.

18. Firstly, the Commission assessed how pricing is determined between the dealerships and BMW SA. The Commission found that the prices charged by BMW agents or dealerships for after-sale servicing for vehicles that are still under warranty are determined and approved by BMW SA. The prices are reviewed annually by BMW SA.
19. Considering the above, the Commission is of the view that the proposed transaction is unlikely to raise any significant unilateral effects concerns as the merging parties do not have the ability to unilaterally increase prices for maintenance work performed on vehicles that are still under warranty and for parts that are fitted to vehicles that are still under warranty.

Unilateral effects assessment relating to the provision of after-sale services or maintenance and supply of spare parts for out of warranty or vehicles with no motor plan (Used BMW and MINI Branded Vehicles)

20. The merging parties indicate that the labour rates for out-of-warranty vehicles are determined independently by the dealership. In this regard, the merging parties indicate that due to extensive competition in the out-of-warranty servicing market, the out-of-warranty service rates are discounted in order to retain customers.
21. The Commission notes that the Acquiring Group has been pricing differently than the Target Group over the past 3 (three) years. The Commission is concerned that the Acquiring Group can still increase its out-of-warranty prices for maintenance work and parts. The Commission notes from the merging parties' submissions that they face some competition from other BMW Agents and independent service centres. However, given the high concentration levels in the provision of BMW and MINI branded out-of-warranty maintenance work and parts, the Commission will continue to monitor this market.
22. Parts for vehicles that are out of the motor plan or out of warranty are priced at the recommended price. The retail price for BMW parts which are not sold as part of in-warranty or in-motor plan work is recommended by BMW SA. In this regard, BMW SA recommends a

cost-plus margin to its dealer agents. A dealer agent may discount that recommended margin but cannot exceed it. The Commission's investigation shows that parts are usually discounted which may be reflective of competition in aftermarket parts.

23. The Commission is concerned about the concentration that arises from the transaction and the effect it may have on the cost of services, out-of-warranty maintenance work and parts. Though this will continue to be monitored, it does not appear that the present transaction is likely to result in substantial unilateral effects on out-of-warranty maintenance work and parts.

Coordinated effects assessment relating to the provision of after-sale services/maintenance for used BMW and MINI Vehicles in Cape Town

24. The Commission finds that pre-merger, there are 8 (eight) BMW and MINI branded dealerships in Cape Town, 2 (two) of which are owned by the Acquiring Group and 2 (two) are owned by the Target Firms. This means that the merger results in a notable increase in concentration for BMW-branded dealerships or agencies. Because of this concentration, the Commission investigated possible coordination in the provision of after-sales service and sale of spare parts for BMW branded vehicles that are out of warranty.

25. The Commission notes that before the merger the Acquiring Group's dealerships determined their own discounts for out-of-warranty services and maintenance. This is also the case with the Target Firms. An extract from the Target Firms' submission reads:

"The retail price for BMW parts which are not sold as part of in-warranty or in-motor plan work is recommended by BMW SA. In this regard, BMW SA recommends a cost-plus margin to its dealer agents. A dealer agent may discount that recommended margin but cannot exceed it. Due to the extensive competition within the parts market the recommended margin is usually discounted. Each dealer agent makes its own decisions about these discounts and the discount applied varies by customer."

26. The same discounts are also applied to after-sale servicing and maintenance work. The pricing information provided by the merging parties relating to their discounted labour rates for out-of-warranty maintenance work shows that the dealerships/agents that form part of the

Acquiring Group were charging different discounted prices for the past three years. The discounts offered by the Acquiring Firm's dealerships are not only due to competition from other BMW agents but also from independent service centres.

27. The Commission recognises that whilst coordination between BMW agents in Cape Town is likely given the concentration in the market, the Acquiring Group dealerships have, pre-merger, been charging different prices. This suggests that this might continue to be the case even post-merger. It is also likely that the 4 (four) remaining BMW agents in Cape Town will continue to act independently, making coordination less likely.

28. The Commission is thus of the view that the proposed merger is unlikely to result in coordination in the provision of after-sale servicing for used BMW and MINI vehicles and the sale of spare parts for used BMW and MINI vehicles. This is because these markets are fragmented with several players active in the market including independent parts suppliers such as Gold Wagen and independent service centres such as Car Care Clinic.

Assessment of the market for the retail of used passenger vehicles

29. In assessing this market, the Commission took guidance from the Tribunal's previous rulings which indicate that the market for sale of pre-owned vehicles is characterised by low entry barriers and various players competing in the market. In the instant transaction, the Commission did not find any evidence that contradicts this finding.

Assessment of the market for the provision of body repair services (Accident Repair Centre) in Cape Town

30. The Commission finds that both the merging parties are active in the provision of accident repair services as they are both approved BMW body repairers in Cape Town. In Cape Town, there are 3 (three) approved BMW and MINI body repair centres (accident repair centres or ARCs). The merging parties will own 2 (two) and the other will be owned by a third party Donford ARC. The merger thus results in a substantial increase in concentration in this market.

31. However, the Commission found that insurers constitute the primary customers of ARCs and that they (insurers) exercise countervailing power. Insurers determine which ARC will be used for an insured customer's motor vehicle repair subject only to the requirement that in-warranty BMW/MINI branded vehicles must be repaired at a BMW approved ARC. For instance, labour rates for accident damage repairs are negotiated by the individual insurance companies with the ARC and concluded in a formal Service Level Agreement (SLA). These SLAs are renewed periodically between the parties.

32. The Commission will continue to monitor this market given high concentration levels and the possibility of exploitative conduct. However, it does not appear that the present transaction is likely to substantially prevent or lessen competition in the accident repair market as the customers of the merging parties appear to have countervailing power.

Public interest

Effect of employment

33. The merging parties gave an unequivocal statement that there will not be any retrenchments as a result of the transaction. The employees of the Target Firms will be transferred in terms of section 197 of the Labour Relations Act of 1995 and accordingly their employment will not be negatively affected.

34. The Commission engaged with the unions and employee representatives representing the employees of the merging parties and no concerns were raised.

The promotion of a greater spread of ownership, in particular to increase the levels of ownership of historically disadvantaged persons and workers in firms in the market

35. The Acquiring Group through SMG WC is a level 4 B-BBEE contributor. This is based on the Acquiring Group's procurement spend. The Acquiring Group does not have any B-BBEE ownership and does not have any employee share ownership scheme.

36. Auric Auto, the firm controlling the Target Firms has a BEE shareholding. As a direct result of the proposed transaction, Auric Auto will cease to have interest in the Target Firms. Thus, the merger will result in the reduction in ownership by HDPs in the Target Firms. However,

the parties indicate that they are in the process of concluding an agreement in terms of which a new B-BBEE shareholder will acquire shares in the Acquiring Firm.

37. Considering the above, the Commission and the merging parties agreed to a condition that will require the merging parties to conclude a B-BBEE transaction in terms of which they will sell shares in the Acquiring Firm to a B-BBEE shareholder within 36 months following the implementation of the proposed transaction. In addition, the merging parties have also agreed that the SMG WC (the primary acquiring firm) will procure as many non-OEM Products as possible from HDPs. The Conditions are attached hereto as **Annexure A**.

38. The transaction raises no other public interest concerns.

Conclusion and recommendations

39. The Commission therefore approves the proposed merger with conditions. The conditions are attached as **Annexure A** hereto.

ANNEXURE A**SMG WESTERN CAPE (PTY) LTD AND MCCARTHY FAMILY TRADING HOLDCO (PTY)****LTD****AND****AURIC AUTO PROPRIETARY LIMITED****CASE NUMBER: 2021SEP0030**

DEFINITIONS AND INTERPRETATION**1. DEFINITIONS**

Unless inconsistent with the context, the words and expressions set forth below shall bear the following meanings and cognate expressions shall bear corresponding meanings.

- 1.1 **“Acquiring Firms”** means SMG Western Cape Proprietary Limited and The McCarthy Family Trading Holdco Proprietary Limited;
- 1.2 **“Approval Date”** means the date on which the Commission approves the Merger;
- 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;
- 1.5 **“B-BBEE Shareholder/s”** means a Historically Disadvantaged Person or a natural person who is a “black person” as defined in the B-BBEE Act, a firm which is majority controlled by “black persons” as defined in the B-BBEE Act, or a “B-BBEE controlled company” as defined in the B-BBEE Act;
- 1.6 **“B-BBEE Transaction”** means a transaction to be concluded with the B-BBEE Shareholders in terms of which at least [confidential]% shareholding in the Primary Acquiring Firm will be transferred to the B-BBEE Shareholder/s;

- 1.7 **“Commission”** means the Competition Commission of South Africa, a statutory body established in terms of section 19 of the Competition Act;
- 1.8 **“Commission Rules”** means the Rules for the Conduct of Proceedings in the Commission;
- 1.9 **“Competition Act”** means the Competition Act, 89 of 1998 as amended;
- 1.10 **“Conditions”** means the conditions set out in this Annexure A;
- 1.11 **“Days”** means business days being any day other than a Saturday, Sunday or official public holiday in South Africa;
- 1.12 **“Historically Disadvantaged Person”** means a historically disadvantaged person as defined in sections 3 (2) of the Competition Act;
- 1.13 **“Implementation Date”** means the date which is defined as the Effective Date in the Merger Agreement that is the commencement of business on the first Day of the month succeeding the date on which all the conditions precedent in the Merger agreement are fulfilled and the Merger agreement becomes unconditional and binding on the Primary Acquiring Firm and the Target Firm;
- 1.14 **“Merger”** means the Acquiring Firms’ acquisition of the business of the Target Firms as contemplated in the transaction notified to the Commission under case number 2021SEP0030;
- 1.15 **“Merging Parties”** means the Acquiring Firms and the Target Firm;
- 1.16 **“Non-OEM Products”** means those goods and services the procurement of which is not prescribed or regulated by BMW South Africa Proprietary Limited;
- 1.17 **“Primary Acquiring Firm”** means SMG Western Cape Proprietary Limited;
- 1.18 **“South Africa”** means the Republic of South Africa;
- 1.19 **“Target Firms”** means the Target Firm’s businesses comprising the Constantia BMW Agency, the Cape Town BMW Agency and the Auto Atlantic BMW Approved Repair

Centre, certain of the assets of those businesses (listed equipment, work in progress, consumables, parts and goodwill), the Leases and the employees currently employed by those businesses;

- 1.20 **“Transfer”** means the transfer of [confidential] shares in the Primary Acquiring Firm on mutually acceptable commercial terms to the Primary Acquiring Firm and one or more B-BEEE Shareholder/s.
- 1.21 **“Transfer Period”** means the period beginning after the expiry of 36 months from the Implementation Date and ending 6 months thereafter;
- 1.22 **“Tribunal”** means the Competition Tribunal of South Africa;
- 1.23 **“Tribunal Rules”** means the Rules for the Conduct of Proceedings in the Tribunal;
- 1.24 **“Trustee”** means one or more natural or legal person(s), independent of the Parties, who is appointed by the Primary Acquiring Firm in terms of these Conditions, who shall, inter alia, have the exclusive mandate to implement the Transfer during the Trustee Period;
- 1.25 **“Trustee Period”** means six months after appointment of the Trustee in terms of these Conditions following the expiry of 36 (thirty-six) months from the Implementation Date.

2. **RECORDAL**

- 2.1 On 15 September 2021, the Commission received notice of an intermediate merger wherein the Primary Acquiring Firm intends to acquire control over the Target Firms. Following its investigation, the Commission found that the merger is unlikely to substantially prevent or lessen competition in any relevant market.
- 2.2 In considering the effect of the merger on public interest, the Commission found that the merger would result in a dilution of ownership by HDPs in the Target Firms from **[confidential]% to [confidential]%**. To remedy the concern, the Primary Acquiring Firm has agreed to these Conditions.

3. CONDITIONS TO THE APPROVAL OF THE MERGER

- 3.1 The Primary Acquiring Firm will ensure that within 36 (thirty-six) months from the Implementation Date, a shareholding of at least [confidential]% in the Primary Acquiring Firm is transferred on mutually acceptable commercial terms to one or more B-BEEE Shareholder/s.
- 3.2 In furtherance of the objectives of the B-BBEE Transaction, the Primary Acquiring Firm shall ensure that B-BBEE Shareholder/s shall be entitled to nominate for election to the Primary Acquiring Firm's board of directors, 1 director for every 15% of the Primary Acquiring Firm's shares held by the B-BBEE Shareholder/s.
- 3.3 Prior to the implementation of the B-BBEE Transaction, the Primary Acquiring Firm will provide the Commission with details of the B-BBEE Transaction in writing, for the Commission's approval. These details shall include, but not be limited to, the transaction structure, identities of prospective B-BEEE Shareholder/s, documentary evidence that the prospective shareholders are B-BEEE Shareholder/s, the proportion of shareholding that each prospective B-BEEE Shareholder/s will receive, the number of board appointments each B-BEEE Shareholder/s is entitled to and confirmation of whether the B-BBEE Transaction constitutes a merger for the purposes of the Act.
- 3.4 Within 60 (sixty) Days after receipt of the details of the B-BBEE Transaction, the Commission shall confirm whether or not the BEE Shareholders comply with the BEE requirements as stipulated in these Conditions.
- 3.5 For the avoidance of doubt, to the extent that the B-BBEE Transaction constitutes a small, an intermediate or large merger in terms of the Competition Act, the B-BBEE Transaction can then only be implemented once same has been notified to the Commission as a small, an intermediate or large merger as applicable, in terms of the Competition Act and approved with or without conditions.
- 3.6 That for 24 (twenty-four) months from the Implementation Date the Primary Acquiring Firm will ensure that it does not reduce procurement of non-OEM Products from Historically

Disadvantaged Persons below the level achieved by the Target Firms in its scorecard which expired during September 2021.

4. **TRANSFER BY THE TRUSTEE**

- 4.1 If the Primary Acquiring Firm fails to transfer the [confidential]% shareholding in the Primary Acquiring Firm to one or more B-BEEE shareholder/s within the Transfer Period, the Trustee shall implement the Transfer to one or more B-BEEE Shareholder/s in accordance with these Conditions.
- 4.2 The Primary Acquiring Firm shall procure that the Trustee enjoys an exclusive mandate and a power of attorney to implement the Transfer to one or more B-BBEE Shareholders/s during the Trustee Period.
- 4.3 Notwithstanding clause 4.1, the Trustee shall be required to use all reasonable commercial endeavours to procure that any disposal concluded in respect of the Transfer shall be on mutually acceptable commercial terms to the Primary Acquiring Firm and the B-BEEE Shareholder/s.
- 4.4 Should the Trustee fail to conclude a disposal in terms of these Conditions, the Trustee may apply to the Commission for an extension of the Trustee Period for a maximum of one (1) further period which period shall not exceed 3 (three) months, on good cause shown. The Commission's consent to an extension may not be unreasonably withheld.
- 4.5 The Trustee shall:
- 4.5.1 submit to the Commission and the Primary Acquiring Firm a quarterly report (that is, every 3 (three) months) on progress in implementing the Transfer;
- 4.5.2 submit, in writing, to the Commission and the Primary Acquiring Firm the name of the potential and actual B-BBEE Shareholder/s together with any relevant documentation in respect of the potential B-BBEE Shareholder/s that the Commission may reasonably request; and

- 4.5.3 procure that the B-BBEE shareholder/s provides the Commission and the Primary Acquiring Firm with an affidavit deposed to by a senior official of that potential and actual B-BBEE Shareholder/s confirming the accuracy of all information relating to the actual B-BBEE Shareholder/.

5. THE APPOINTMENT OF THE TRUSTEE

- 5.1 The Primary Acquiring Firm shall, subject to the prior written approval of the Commission, appoint a Trustee in accordance with this clause 4.1.
- 5.2 The Trustee shall:
- 5.2.1 be independent of the Merging Parties; possess the necessary qualifications to carry out his or her mandate;
 - 5.2.2 be an independent, experienced investment banker, consultant or auditor;
 - 5.2.3 not, at the time of appointment, provide auditing or advisory services to the Merging Parties; and
 - 5.2.4 not, at the time of appointment, be exposed to a conflict of interest.
- 5.3 The Merging Parties shall propose a Trustee for the Commission's written approval within five (5) Days of the expiry of the Transfer Period.
- 5.4 The proposal in clause 5.3 shall contain such information as is necessary for the Commission to determine whether the proposed Trustee is suitable to execute the Trustee's mandate and shall include, *inter alia*, the proposed Trustee's contact details, qualifications and experience as well as his/her comprehensive curriculum vitae.
- 5.5 The Trustee's relationship (if any) with the Primary Acquiring Firm for the 24 (twenty-four) months preceding the Implementation Date shall be disclosed to the Commission in writing and under oath and the potential Trustee must depose to an affidavit in this regard.

- 5.6 The Commission shall approve or reject the proposed Trustee in writing after receiving the proposal in clause 5.3, which approval shall not be unreasonably withheld. Should the Commission reject the proposed Trustee, the Commission shall provide detailed reasons justifying the rejection of the proposed Trustee.
- 5.7 The Primary Acquiring Firm shall appoint the Trustee approved of by the Commission pursuant to clause 5.6 within five (5) Days of the Commission's approval.
- 5.8 If the proposed Trustee is rejected by the Commission, the Parties shall submit the names of at least two (2) more proposed Trustees within 15 Days after being informed of that rejection.
- 5.9 If the Commission, acting reasonably and on good cause shown, rejects all further proposed Trustees, the Commission shall appoint a Trustee within 30 Days of rejecting the further proposed Trustees.
- 5.10 The Primary Acquiring Firm shall:
- 5.10.1 pay the reasonable fees and expenses of the Trustee on the terms and conditions agreed upon in writing between the Primary Acquiring Firm and the Trustee;
- 5.10.2 within five (5) Days after the Trustee's appointment, the Primary Acquiring Firm should pursuant execute in favour of the Trustee a comprehensive power of attorney granting him or her the powers and authorities necessary to execute his or her obligations.
- 5.11 A certified copy of the power of attorney shall be submitted to the Commission within five (5) Days of the Trustee's appointment.
- 5.12 The power of attorney granted to the Trustee shall expire on the earlier of the termination of the Trustee's mandate or the discharge of the Trustee.
- 5.13 The Primary Acquiring Firm shall indemnify the Trustee and hold the Trustee harmless against any liabilities arising from the performance of the Trustees' duties, except to

the extent that such liabilities result from the wilful default, recklessness and/or negligence of the Trustee.

6. **MONITORING OF COMPLIANCE WITH THE CONDITIONS**

- 6.1 The Acquiring Firm shall inform the Commission of the Implementation Date within 5 (five) Days after its occurrence.
- 6.2 The Acquiring Firm shall circulate a copy of the conditions to their employees, employee representatives and any relevant trade unions within 5 (five) Days of the Approval Date.
- 6.3 Within 5 days of the Approval Date, the Primary Acquiring Firm shall submit to the Commission the Target Firm's BEE scorecard referred to in clause 3.6.
- 6.4 Within 30 Days after the first and second anniversaries of the Approval Date respectively, the Acquiring Firm shall report to the Commission detailing its progress in achieving compliance with these Conditions. This report shall be accompanied by an affidavit attested to by a senior official of the Acquiring Firm confirming the accuracy of the report.
- 6.5 The Commission may request additional information from the Acquiring Firm from time to time as necessary to monitor compliance with these Conditions.
- 6.6 Any person who believes that the Acquiring Firm has not complied with the Conditions may approach the Commission. In the event that the Commission determines that there has been an apparent breach by the Acquiring Firm of the Conditions, the matter shall be dealt with in terms of Rule 39 of the Rules for the Conduct of Proceedings in the Commission.

7. **APPARENT BREACH**

- 7.1. If the Commission receives any complaint concerning non-compliance with the Conditions or otherwise determines that there has been an apparent breach by the Primary Acquiring Firm of these Conditions, the breach shall be dealt with in terms of Rule 39 of the Commission Rules read with Rule 37 of the Tribunal Rules.

8. VARIATION

- 8.1. The Primary Acquiring Firm may at any time, on good cause shown, apply to the Commission for the Conditions to be lifted, revised or amended. Should a dispute arise concerning the variation of the Conditions, the Primary Acquiring Firm shall apply to the Tribunal, on good cause shown, for the Conditions to be lifted, revised or amended.

9. GENERAL

- 9.1 All correspondence in relation to these Conditions must be submitted to the following email addresses: 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