

COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No.: LM108Sep19

In the matter between:

Simba (Pty) Ltd

Primary Acquiring Firm

And

Pioneer Food Group Ltd

Primary Target Firm

Panel: : M Mazwai (Presiding Member)
: Y Carrim (Tribunal Panel Member)
: AW Wessels (Tribunal Panel Member)
Heard on : 5 March 2020
Decided on : 5 March 2020

ORDER

Further to the recommendation of the Competition Commission in terms of section 14A(1)(b) of the Competition Act, No. 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 marked as **Annexure A**; and
2. a Merger Clearance Certificate be issued in terms of Competition Tribunal Rule 35(5)(a).



Mondo Mazwai
Presiding Member

5 March 2020

Date

Concurring: Ms Y Carrim and Mr AW Wessels



competitiontribunal
SOUTH AFRICA

Notice CT 10

About this Notice

This notice is issued in terms of section 16 of the Competition Act.

You may appeal against this decision to the Competition Appeal Court within 20 business days.

Contacting the Tribunal

The Competition Tribunal
Private Bag X24
Sunnyside
Pretoria 0132
Republic of South Africa
tel: 27 12 394 3300
fax: 27 12 394 0169
e-mail: ctsa@comptrib.co.za

Merger Clearance Certificate

Date : 06 March 2020

To : Bowmans Gilfilan Attorney

Case Number: LM108Sep19

Simba (Pty) Ltd And Pioneer Food Group Ltd

You applied to the Competition Commission on **06 September 2019** for merger approval in accordance with Chapter 3 of the Competition Act.

Your merger was referred to the Competition Tribunal in terms of section 14A of the Act, or was the subject of a Request for consideration by the Tribunal in terms of section 16(1) of the Act.

After reviewing all relevant information, and the recommendation or decision of the Competition Commission, the Competition Tribunal approves the merger in terms of section 16(2) of the Act, for the reasons set out in the Reasons for Decision.

This approval is subject to:

- no conditions.
- the conditions listed on the attached sheet.

The Competition Tribunal has the authority in terms of section 16(3) of the Competition Act to revoke this approval if

- a) it was granted on the basis of incorrect information for which a party to the merger was responsible.
- b) the approval was obtained by deceit.
- c) a firm concerned has breached an obligation attached to this approval.

The Registrar, Competition Tribunal

ANNEXURE A

IN THE LARGE MERGER INVOLVING:
SIMBA PROPRIETARY LIMITED
AND
PIONEER FOOD GROUP LIMITED

1. DEFINITIONS

In this document, the expressions used above will have the appropriate meanings assigned to them and the following and related expressions will bear the following meanings:

- 1.1 **"Act"** means the Competition Act, No. 89 of 1998, as amended;
 - 1.2 **"Approval Date"** means the date on which the Proposed Transaction is approved in terms of the Act;
 - 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 Economic Empowerment Act, No. 53 of 2003 (as amended);
 - 1.5 **"Cautionary Announcement"** means the cautionary announcement on 15 July 2019 relating to the Proposed Transaction;
 - 1.6 **"Closing Date"** means the date on which the Proposed Transaction is implemented by the Merging Parties;
 - 1.7 **"Commission"** means the Competition Commission of South Africa;
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- 1.8 **"Conditions"** means the Merger conditions included in this Annexure A;
- 1.9 **"Days"** means any day that is not a Saturday, Sunday or public holiday in South Africa;
- 1.10 **"Disposals"** means the transfer of certain businesses of Pioneer Foods, which include [...]¹, that will take place after the Closing Date;
- 1.11 **"Emerging Farmers"** means small-scale and medium-scale historically disadvantaged farmers who are attempting to become commercial or larger-scale farmers and who are, or may be, contracted as direct or indirect suppliers to the Merged Firm;
- 1.12 **"Employee"** means any permanent employee (as contemplated under South African labour law) of the Merging Parties in South Africa;
- 1.13 **"Fund"** means the fund referred to in clause 8 below;
- 1.14 **"Government"** means the Government of the Republic of South Africa;
- 1.15 **"Historically Disadvantaged"** means historically disadvantaged persons within the meaning of the Act;
- 1.16 **"Key Inputs"** means the following goods locally produced, grown or manufactured material and key inputs in South Africa of which Pioneer Foods is a significant purchaser and currently related to, and used in, its business operations: [...]², it being recorded that the proportion of such goods which are currently procured by Pioneer Foods and Simba from local producers is set out in Exhibit C³;
- 1.17 **"Labour Relations Act"** means the Labour Relations Act, No. 66 of 1995 (as amended);

¹ Information claimed as confidential.

² Information claimed as confidential.

³ Document claimed as confidential.

- 1.18 **“Merged Firm”** means the combination of Simba and Pioneer Foods in South Africa, with PepsiCo as the controlling shareholder;
- 1.19 **“Merger”** means the proposed transaction between the Merging Parties and which constitutes a large merger;
- 1.20 **“Merger Commitments”** means the commitments which the Merging Parties made to the Minister to promote the public interest and which were offered by the Merging Parties as conditions to the Merger’s approval. The Merger Commitments have been largely incorporated in the Conditions;
- 1.21 **“Merging Parties”** means PepsiCo, Simba and Pioneer Foods;
- 1.22 **“Minister”** means the Minister for the South African ministry of Trade, Industry and Competition;
- 1.23 **“PepsiCo”** means PepsiCo Inc.;
- 1.24 **“Pioneer Foods”** means Pioneer Food Group Ltd;
- 1.25 **“PLI”** means Pepsi Lipton International Ltd, a global joint venture with Unilever, which licenses the Lipton trademark and concentrate kits for use by Pioneer Foods in the manufacture of ready to drink tea, on an arm’s length basis;
- 1.26 **“Planning Phase”** means the 12-month period from the Closing Date, during which the Merged Firm is required make the necessary preparations to implement clause 8 (Development Fund) of the Conditions;
- 1.27 **“Production Operations”** means the current proprietary production and manufacturing operations of the Merged Firm together with their productive capacity as set out in Exhibit B⁴;

⁴ Document claimed as confidential.

- 1.28 “**Simba**” means Simba (Pty) Ltd, a locally incorporated subsidiary of PepsiCo;
- 1.29 “**SMME**” means a small, very small, medium or micro enterprise as contemplated in the National Small Enterprise Act, No. 102 of 1996;
- 1.30 “**South Africa**” means the Republic of South Africa;
- 1.31 “**South African Employees**” means Employees who are South African citizens;
- 1.32 “**Tribunal**” means the Competition Tribunal of South Africa; and
- 1.33 “**Worker**” means an Employee as defined in the Labour Relations Act and, in the context of ownership, refers to ownership by a broad-base of Workers.

2. BROAD-BASED BLACK ECONOMIC EMPOWERMENT

- 2.1 The Merging Parties have agreed to implement a B-BBEE ownership plan, the main parameters of which will:
- 2.1.1 provide for an equity value for the Workers of the Merged Firm (it being agreed that for the purposes of this clause 2 only, the term “Workers of the Merged Firm” shall include such Workers of Pioneer Foods who may be transferred after the Closing Date to a different employer as a result of any of the Disposals) of no less than R1.6 billion which will be provided in the form of PepsiCo common stock (the “**Equity**”), which will be unencumbered and which will be issued within 12 (twelve) months from the Closing Date to a South African trust to be established, after consultation with Workers’ representatives appointed for that purpose, for the benefit of Workers of the Merged Firm (the “**Workers Trust**”);
- 2.1.2 the majority of the trustees of the Workers Trust will be selected by the Workers of the Merged Firm, provided that the costs of establishing the Workers Trust and implementing

the Equity issue shall not be borne by the Workers Trust, and shall be borne by the Merged Firm;

- 2.1.3 provide for the retention of the Equity in the Workers Trust for a period of no more than 5 (five) years from the Closing Date (the “**reorganisation period**”);
- 2.1.4 provide, during the reorganisation period, for the distribution of 50% of all dividends received by the Workers Trust to the Workers and retention in the Workers Trust of the remaining 50% of the dividends received (which may be re-invested in PepsiCo common stock in the discretion of the trustees of the Workers Trust);
- 2.1.5 provide for the appointment by the Workers Trust of at least 1 (one) non-executive director to the board of Pioneer Foods on creation of the Workers Trust and in any event within 12 (twelve) months from the Closing Date;
- 2.1.6 provide for the entitlement of the Workers Trust to exercise the equivalent of 12.9% voting rights in Pioneer Foods upon issue of the Equity for the remainder of the reorganisation period;
- 2.1.7 provide for the compulsory conversion of the Equity into ordinary shares in Pioneer Foods up to 13% of its total issued share capital at the end of the reorganisation period, such shares to be valued on a fair market basis (as determined by an independent expert if there is a dispute between the parties) (the “**Shares**”); it being acknowledged that none of Pioneer Foods, PepsiCo or any associated company will provide any funds, guarantees or any other instrument to facilitate the purchase of the Shares (to the extent the value of the Equity and/or cash in the Workers Trust is less than 13% of the value of the Shares), and that any such funding required by the Workers be reasonably acceptable to PepsiCo. PepsiCo will ensure that during the reorganisation period Pioneer Foods remains an operating subsidiary of PepsiCo in a similar fashion as it is at the Closing Date;
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- 2.1.8 have no guaranteed exit mechanism for the Workers Trust from Pioneer Foods in respect of the Shares but the parties will investigate a mechanism that involves the issue of units to the beneficiaries of the Workers Trust to create internal liquidity;
- 2.1.9 require the Workers Trust, PepsiCo and Pioneer Foods to enter into good faith negotiations to be completed by or before the end of the reorganisation period, to execute a shareholders agreement to provide for appropriate minority protection for the Workers Trust (with no veto rights and without impeding the day to day operations of Pioneer Foods and any commercial or growth initiatives).

3. EMPLOYMENT

- 3.1 The Merged Firm shall not retrench any Employee as a result of the Merger for a period of 5 (five) years from the Closing Date.
- 3.2 For the avoidance of doubt, retrenchments do not include (i) voluntary separation arrangements; (ii) voluntary early retirement packages; (iii) unreasonable refusals to be redeployed in accordance with the provisions of the Labour Relations Act; (iv) resignations or retirements in the normal course; and (v) terminations in the normal course of business, including but not limited to, dismissals as a result of misconduct or poor performance.
- 3.3 The Merging Parties commit and confirm that the Merged Firm shall, for a period no less than 5 (five) years from the Closing Date, maintain at least:
 - 3.3.1 the same number of Employees in the aggregate as are employed at the Merged Firm in South Africa as at the Closing Date; and
 - 3.3.2 the same number of South African Employees in the aggregate as are employed at the Merged Firm in South Africa as at the Closing Date.

- 3.4 The aggregate number of Employees to which this commitment applies shall be reduced by the number of Employees transferred in terms of any Disposals as may occur post the Closing Date (whether in terms of section 197 of the Labour Relations Act or otherwise).
- 3.5 PepsiCo underlines its commitment to grow the operations of the Merged Firm and to create employment opportunities throughout the supply chain associated with the Merged Firm in South Africa including, without limitation, as outcomes from the development Fund set out in clause 8 below. In this regard, PepsiCo undertakes that no less than 500 direct employment opportunities within the Merged Firm and 2,500 indirect employment opportunities in suppliers to the Merged Firm will be created within 5 (five) years of the Closing Date (unless material and substantial changes to the macroeconomic and/or political conditions occur that prevent the planned growth strategy of the Merged Firm). In that event, the Merged Firm shall propose to the Commission and the Minister in writing reduced numbers of direct and indirect employment opportunities.
- 3.6 Any collective agreements in terms of the Labour Relations Act with respect to Pioneer Foods will be unaffected.

4. LOCATION OF HEAD OFFICE AND TAX RESIDENCY

- 4.1 The Merged Firm shall remain incorporated in South Africa.
- 4.2 Furthermore, the Merged Firm shall constitute PepsiCo's new sub-Saharan African sector head office, whose operations will be managed and directed from South Africa.
- 4.3 The Merged Firm will remain a tax resident in South Africa.

5. PRODUCTION

- 5.1 Subject to any Disposals that may occur, the Merging Parties commit and undertake that the aggregate productive capacity and capabilities associated with the Production Operations and related facilities in South Africa shall be maintained and kept in place by the Merged Firm in

line with PepsiCo's commitment and intention to use and grow the local operations in order to supply South Africa and as a base or export-hub from which to export products of the Merged Firm.

- 5.2 The Merging Parties shall endeavour to seek all commercially practicable ways to increase the presence and sales of Pioneer Foods brands throughout Africa and internationally, with an initial focus on the Ceres and Safari brands and Rooibos related products. PepsiCo also endeavours to use all its efforts to procure that PLI sources Rooibos from South Africa for use in ready to drink tea internationally.
- 5.3 Consistent with this commitment, the Merging Parties undertake to:
- 5.3.1 maintain and grow the productive capacity and capabilities associated with the Production Operations so as to meet demand;
 - 5.3.2 make a cumulative investment of R5.5 billion over a 5-year timeframe from the Closing Date in the development of the overall operations of Pioneer Foods; and
 - 5.3.3 make a further investment of R1 billion over a 5-year period to grow and expand the capacity of the Production Operations of the Merged Firm in South Africa subject to favourable macroeconomic and political conditions.
- 5.4 For purposes of the productive capacity, the ratio of Production Operations as applies at the Approval Date, shall be determined by having regard to the highest production level attained in any of the 2017, 2018 and 2019 years.

6. LOCAL SUPPLY CHAINS

- 6.1 The Merging Parties commit that the Merged Firm shall continue and expand the Pioneer Foods policy and practice of maximising local production. This shall be achieved by, *inter alia*, introducing the Food Innovation Valleys concept to South Africa, which seeks to be a catalyst for sustainable growth in the agriculture and food supply chain focused on innovation in order

to develop sustainable, resource-efficient and trusted food systems, bringing together various stakeholders, including government, academics and industry, and delivering:

- 6.1.1 improved farming practices and new technologies to improve agricultural yields and advantaged crops;
 - 6.1.2 long-term sustainable competitive advantage translated into economic growth and new higher value jobs;
 - 6.1.3 an educated workforce with improved entrepreneurial skills; and
 - 6.1.4 an attractive environment for talent and new investments.
- 6.2 The Merging Parties shall ensure that the Merged Firm maintains and grows the level of annual local procurement of Key Inputs in South Africa and commits to procure all its requirements for the Key Inputs locally, provided that the inputs are able to be procured on commercially reasonable and practical terms (particularly as regards appropriate quality standards, availability and reasonably competitive commercial terms).
- 6.3 The Merged Firm shall use its best endeavours to ensure that its packaging requirements are procured from locally produced sources, subject to commercially reasonable and practical terms (particularly as regards appropriate quality standards, availability, competitive commercial terms and cost).
- 6.4 Notwithstanding the above, with effect from the Closing Date, as to procurements in the ordinary course of business, the Merged Firm shall not decrease the current level (as a proportion) of expenditure on local procurement of goods and services in South Africa, provided that the goods and services are able to be procured at the appropriate quality standards and on reasonably competitive commercial terms.

- 6.5 For purposes of local procurement, the ratio of local procurement as applies at the Approval Date, shall be determined by having regard to using the highest procurement levels attained in any of the 2017, 2018 and 2019 years.
- 6.6 Furthermore, the Merged Firm shall:
- 6.6.1 on an annual basis, host a procurement conference or meetings with key local suppliers with the objective of growing, developing and enhancing local procurement and supply, and so that suppliers can meet the quality requirements and other procurement standards of PepsiCo;
 - 6.6.2 report on local procurement as part of the reporting required in terms of clause 9.9 below; and
 - 6.6.3 train and upskill managers and employees of the Merged Firm in order to foster the integration with, and use of local procurement by, the Merged Firm.

7. DOWNSTREAM AGREEMENTS

The Merged Firm shall maintain all sale and distribution agreements with firms controlled by Historically Disadvantaged persons and SMMEs for a period of 2 (two) years from the Closing Date, in line with ordinary business practices and on no less favourable terms and conditions as applicable on the Approval Date (provided that those agreements are on reasonable, commercially justifiable and non-discriminatory terms and conditions, particularly as regards appropriate quality standards, reasonably competitive commercial terms and cost).

8. DEVELOPMENT FUND

- 8.1 Over a 5-year period post the Planning Phase, the Merged Firm shall make available an aggregate amount of R600 million as a development fund for investment in programmes in South Africa with respect to education, SMMEs, enterprise and agricultural development.

8.2 Such investments shall be additive, yet may be related, to existing programmes in this regard related to the Merged Firm, may include programmes related to the Food Innovation Valley concept described in clause 6 above and shall include:

8.2.1 Agricultural development

8.2.1.1 The Merged Firm shall invest R300 million in developing the capacity of Emerging Farmers and expanding Emerging Farmer participation in the supply chain of the Merged Firm.

8.2.1.2 This investment shall include the:

8.2.1.2.1 expansion of Emerging Farmer participation in Key Inputs to be procured by the Merged Firm, which may include the establishment of 2 (two) model farms to empower and upskill Emerging Farmers and other commercial farmers in the area of best-in-class crop management in order to improve their yields, incomes and to reduce greenhouse emissions and water usage;

8.2.1.2.2 creation of new business opportunities complementary to the activities of the model farms including as regards agro-production, processing, storage, logistics, marketing and seed / fertiliser / chemical distribution; and

8.2.1.2.3 strengthening of the technology and innovation base in South Africa by investing in research & development and innovation for South Africa to improve the productivity of Emerging Farmers.

8.2.1.3 The investment shall be aligned with Government's policy in respect of rural development and land reform, and it is envisaged for the investment to include co-investments with development funding institutions or organisations such as the Industrial Development Corporation and the National Empowerment Fund.

8.2.1.4 It is recognised that, in order for the Merged Firm to implement certain of the initiatives referred to in this clause 8.2.1 above, certain deliverables and/or approvals may be required (such as with respect to the provision of adequate and appropriate land, water rights, irrigation, power infrastructure and the like), and the Minister has committed to facilitate constructive engagements with the relevant Government departments to consider requests in relation to these deliverables and/or approvals.

8.2.2 Education & University Partnerships

The Merged Firm shall invest R200 million in education which shall include:

- 8.2.2.1 funding scholarships for Historically Disadvantaged engineering, agronomy and nutrition science students;
- 8.2.2.2 sponsoring additional learnerships to support Historically Disadvantaged individuals who have no formal education and are unemployed to enable them to find employment; and
- 8.2.2.3 collaborating with the Agricultural Research Council and the departments of agriculture at selected South African universities to develop South Africa's research and talent capacity.

8.2.3 Enterprise Development

- 8.2.3.1 The Merged Firm shall make available an amount of R100 million to be invested in South African entrepreneurs as part of an incubator fund.
- 8.2.3.2 The incubator fund shall focus on Historically Disadvantaged persons and shall include a six-month incubator programme during which experts from the Merged Firm shall share development expertise and enable skills transfer.
- 8.2.3.3 The Merged Firm shall consult and seek collaborations with the Industrial Development Corporation and the National Empowerment Fund in the context of the incubator fund.

- 8.3 The amounts in the Fund shall be made available to be disbursed in equal annual portions over the 5-year period, and the administration and management of the Fund shall vest with the Merged Firm. The Merged Firm shall design and implement projects and identify beneficiaries in line with the objectives of the Fund and consistent with principles of longer-term sustainability.
- 8.4 Responsibility for the management of the Investment Fund shall vest in the Merged Firm. The Merged Firm shall, however, actively consult with the Minister regarding the investments, programmes and projects related to the Fund. To this end the Merged Firm and the Minister will establish a Consultative Board, comprising representatives of the parties having sufficient expertise to give guidance in relation to the specific types of programmes referred to in this clause 8 comprising:
- 8.4.1 2 (two) representatives appointed by the Merged Firm (which may remove and replace such appointees);
- 8.4.2 2 (two) representatives appointed by Government, originally being 1 (one) appointee of each of DTIC and the Department of Agriculture, Land Reform and Rural Development or their successors departments with responsibility for agriculture and trade and industry respectively with Government being entitled to remove and replace each such appointee.
- 8.4.3 The Consultative Board shall be a forum for consultation between Government and the Merged Firm. It will work collaboratively with the Merged Firm to achieve the desired outcomes of this clause 8 and shall meet as and when it so determines, but not less than once per annum, with a view to:
- 8.4.3.1 consulting with and make recommendations to the Merged Firm on the implementation of this clause 8 including the identification of beneficiaries of the Fund;

- 8.4.3.2 advise the Merged Firm as to the means and mechanisms to fulfil the objectives of the Fund; and receive reports and presentations from the Merged Firm relating to investments made by the Fund from time to time.
- 8.5 Decisions of the Consultative Board shall ideally be taken by the Merged Firm after consultation with the 2 (two) representatives appointed by Government.
- 8.6 The Consultative Board shall be entitled to require the Merged Firm as and when it is appropriate to make presentations to it relating to the implementation of this clause 8.
- 8.7 For the avoidance of doubt, all the above investments and associated expenditure shall be incremental to any committed expenditure on the part of the Merged Firm. In particular, such expenditure shall be over and above any pre-existing planned corporate social investment expenditure on the part of Pioneer Foods (to be disclosed to the Commission 60 (sixty) Days from the Closing Date).
- 8.8 Furthermore, no administration fees or other costs or disbursements may be deducted from the aggregate value of the Fund.

9. MONITORING

- 9.1 The Merging Parties shall circulate the non-confidential version of the Conditions to their employees, the employee representatives and trade unions, within 10 (ten) Days of the Closing Date.
- 9.2 As proof of compliance herewith, the Merged Firm shall within 5 (five) Days of circulating the Conditions, submit an affidavit by a senior official attesting to the circulation of the Conditions and provide a copy of the notices' public version that were circulated to the employees, employee representatives and trade unions.

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- 9.3 The Merging Parties shall, within 10 (ten) Days of the Closing Date, publish the non-confidential version of the Conditions on their South African websites for a period of 1 (one) year from the Closing Date.
- 9.4 As proof of compliance herewith, the Merged Firm shall within 5 (five) Days of publishing the Conditions, submit an affidavit by a senior official attesting to the fact that the Conditions have been published on the Merging Parties' South African websites.
- 9.5 Within 5 (five) days after the Closing Date, the Merged Firm shall notify the Commission in writing of the Closing Date.
- 9.6 For the purposes of clause 2 above, the Merged Firm shall provide the Commission with the names and employee numbers of Employees participating in the Workers Trust at least 1 (one) month before the implementation of the Workers Trust.
- 9.7 For the purposes of clause 3.3 above, the Merged Firm shall provide the Commission with the aggregate number of Employees within 15 Days of the Closing Date.
- 9.8 For the purposes of clause 3 above, the Merged Firm shall inform the Commission of any Disposals at conclusion of the sale agreements, in the event that the Disposals do not trigger notification under the Act.
- 9.9 For every 3 (three) months during the Planning Phase, the Merging Parties shall provide the Commission with a written report outlining the progress made in preparing for the implementation of clause 8 (Development Fund) as well as proposals on how the Fund will be disbursed.
- 9.10 Within 45 (forty-five) Days of each anniversary of the Approval Date up until the 5th anniversary (and 6th anniversary as it relates to the Fund Conditions, and 7th anniversary as it relates to the provisions of clause 2 of these Conditions) of the Closing Date, the Merged Firm shall provide a suitable and appropriately detailed annual report regarding the Merged Firm's compliance with the Conditions.
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- 9.11 The report referred to in clause 9.9 above shall be accompanied by an affidavit attested to by the chief executive officer of the Merged Entity confirming the accuracy of the annual report and full compliance of these Conditions in the year to which the reports relate.
- 9.12 In the event that the Commission receives a complaint regarding non-compliance by the Merged Firm with these Conditions, or otherwise determines that there has been an apparent breach by the Merging Parties 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.
- 9.13 All correspondence in relation to these conditions must be submitted to the following e-mail address: mergerconditions@compcom.co.za.

10. VARIATION

- 10.1 The Merged Firm or the Commission may at any time, and on good cause shown, apply to the Competition Tribunal for any of the Conditions to be waived, relaxed, modified and/or substituted.
- 10.2 The Commission, the Minister, and/or any registered trade union (as contemplated by section 13A(2)(a) of the Act) of the Merged Firm shall be entitled to oppose any variation of the Conditions.