

COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No.: LM211Nov18

In the matter between:

BSA International S.A.

Primary Acquiring Firm

And

The Infant Nutrition Business of Aspen Pharmacare Holdings Limited.

Primary Target Firm

Panel : Y Carrim (Presiding Member)
M Mazwai (Tribunal Member)
A Ndoni (Tribunal Member)

Heard on : 20 February 2019

Decided on : 20 February 2019

ORDER

Further to the recommendation of the Competition Commission in terms of section 14A(1)(b) of the Competition Act, 1998 ("the Act") the Competition Tribunal orders that -

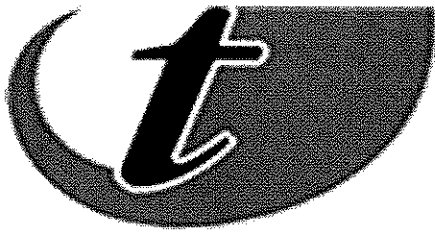
1. the merger between the abovementioned parties be approved in terms of section 16(2)(b) of the Act subject to the conditions attached hereto marked as **Annexure A**; and
2. a Merger Clearance Certificate be issued in terms of Competition Tribunal rule 35(5)(a).



Presiding Member
Ms Yasmin Carrim

20 February 2019
Date

Concurring: Ms Mondo Mazwai and Ms Andiswa Ndoni



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: 20 February 2019

To: **Bowman Attorneys**

Case Number: LM211Nov18

BSA International S.A. And The Infant Nutrition Business of Aspen
Pharmacare Holdings Limited.

You applied to the Competition Commission on **26 October 2018** 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”

Recordal

It is recorded that the conditions below were imposed upon the merging parties in the large merger between Nestle S.A. and the The Infant Nutrition Business of Pfizer Inc. (“conditions”) (LM037Jun12).

Aspen Pharmacare Holdings Ltd subsequently purchased the divested business and undertook to abide by the conditions (see LM068Jul13).

BSA International S.A. intends to acquire from Aspen Pharmacare Holdings Ltd, *inter alia*, the divested business and has undertaken to abide by the conditions as a successor-in-title to Aspen Pharmacare Holdings Ltd.

For the avoidance of doubt, the conditions as set out below will apply, *mutatis mutandis*, to the merging parties in the large merger between Aspen Pharmacare Holdings Ltd and BSA International S.A.:

Conditions

In the Large Merger between:

NESTLÉ S.A.

AND

THE INFANT NUTRITION BUSINESS OF PFIZER INC.

DIVESTITURE CONDITIONS

1. INTERPRETATION

- 1.1. The headings of the clauses in Annexure “X” are for the purpose of convenience and reference only, and shall not be used in the interpretation of, or to modify or amplify, the terms of the referral of the Competition Commission of South Africa to which this document is annexed.

1.2. In this Annexure unless a contrary intention clearly appears, words importing:

1.2.1. any one gender include the other genders;

1.2.2. the singular includes the plural and vice versa;

1.2.3. natural persons include legal persons and vice versa.

1.3 The following terms shall have the meanings assigned to them hereunder and in any annexure to it, and cognate expressions shall have corresponding meanings, namely:

1.3.1 **"the Act"** – means the Competition Act 89 of 1998, as amended;

1.3.2 **"the black-out period"** – means a period of 10 years following the rebranding period during which period Nestlé commits not to re-introduce any of the divested brands within the divestiture area;

1.3.3 **"clearance date"** – the date to be referred to in the Tribunal's Merger Clearance Certificate (Form CT10);

1.3.4 **"the Commission"** – means the Competition Commission of South Africa;

1.3.5 **"Commission's Referral"** – means the Commission's Referral of Large Merger Certificate, Form CC17, including and annexures "X" and "Y" attached thereto;

1.3.6 **"days"** – means business days;

1.3.7 **"the date of disposal"** – the date on which transfer of legal title of the divested business is transferred to the proposed purchaser and the date on which the intellectual property in terms of the licensing agreement has been licensed to the proposed purchaser;

- 1.3.8 **“the designated recipients within Nestlé”** – means the General Counsel (Nestlé Nutrition) of Nestlé, the Senior Competition Counsel of Nestlé and the Company Secretary of Nestlé South Africa (Proprietary) Limited;
- 1.3.9 **“the designated recipients within Pfizer Inc.”** – means General Counsel, the Senior Competition Counsel and the Company Secretary of Pfizer Inc.;
- 1.3.10 **“disparage”** – refers to marketing and advertising activities and/or efforts that attack, discredit other products, services, advertisers, or advertisements and provide false and misleading communications to customers either directly or indirectly;
- 1.3.11 **“the divested business”** – means the infant milk formula business of Pfizer Nutrition as referred to in section 2 of this document. For the avoidance of doubt, the divested business does not include the pre- and post-natal maternal supplement business sold by Pfizer Nutrition under the “Materna” brand;
- 1.3.12 **“the divested area”** – means the areas where the divested business is conducted and is limited to South Africa;
- 1.3.13 **“the divestiture period”** – is the period of nine months, or the further extended period in terms of clause 3.1 hereof, from the clearance date within which Nestlé must secure a proposed purchaser, and conclude a sale and licensing agreement of the divested business;
- 1.3.14 **“the divested products”** – means all infant nutrition products that are sold by the divested business in South Africa at the clearance date under the divested brands identified in section 2.1;
- 1.3.15 **“final date”** – means the last day of any particular time period prescribed in this order wherein which any activity connected to the divestment of the divested business has to be duly completed;
- 1.3.16 **“Hold Separate Manager(s)”** – the person(s) appointed by Nestlé to manage the day-to-day operations of the divested business under the supervision of the Trustee;

- 1.3.17 **“licence agreement”** – means an agreement, to be approved by the Commission, that will be entered into by Nestlé and the proposed purchaser, whereby certain intellectual property of the divested business is to be licensed to the proposed purchaser;
- 1.3.18 **“merging parties”** – means Nestlé S.A. (**“Nestlé”**) and the infant nutrition business of Pfizer Inc. (**“Pfizer Nutrition”**);
- 1.3.19 **“process technology”** – means the trade secrets, confidential information, inventions, discoveries, know-how, product specifications, practices, processes, procedures, specifications, engineering data, results, software, firmware, programs and source disks, source codes, databases, and data collections, designs, research records, records of inventions, test information, market surveys, and marketing know-how, works of authorship and the copyrights therein and discoveries, conceptions, ideas, inventions, compositions and methods whether or not patentable or susceptible or any legal protection necessary to develop and manufacture the divested products and/or pipeline products or any ingredient or component that forms part of the divestiture products and/or pipeline products and in respect of which Nestlé, at the clearance date, owns the underlying intellectual property rights;
- 1.3.20 **“proposed purchaser”** – means any willing and able independent third party, which elects to purchase the divested business, meets all the requirements of clause 6 hereof and which is approved by the Commission;
- 1.3.21 **“pipeline products”** means the products set out in the Confidential Schedule;
- 1.3.22 **“proposed transaction”** – means the sale of the divested business to the proposed purchaser;
- 1.3.23 **“the rebranding period”** – means a period of 10 years following the date of disposal;
- 1.3.24 **“Pfizer Nutrition employee(s)”** – means all Pfizer Nutrition employees who are engaged in South Africa in the divested business who are wholly or primarily engaged in,

or necessary for, the operation of the divested business and who consent to the transfer of their employment;

1.3.25 **"the Tribunal"** – means the Competition Tribunal of South Africa;

1.3.26 **"the Trustee"** – means the individual charged with the duty of monitoring and executing the Trustee mandate in accordance with the order to which the Trustee Mandate is attached;

1.3.27 **"Trustee divestiture period"** – means the period of three months, or a further extended period in terms of clause 3.7, within which the Trustee executes his mandate to divest the divested business in terms of the power of attorney and which commences at the end of the divestiture period;

1.3.28 **"trustee team"** – advisors, assistants and other personnel appointed by the Trustee to assist the Trustee in the execution of his/her mandate.

2. DIVESTED BUSINESS

Nestlé will acquire the assets (tangible and intangible) that form part of the divested business from Pfizer Nutrition in terms of the transaction to which these divestiture conditions apply. Nestlé shall procure the divestiture of the divested business insofar as it relates to South Africa as a going concern. The divested business shall comprise and/or include obligations on Nestlé regarding –

Intangible Assets

2.1 A fully paid-up exclusive 10 year license to use the following trademarks in the divested area:

2.1.1 S-26

2.1.2 S-26 Promil;

2.1.3 S-26 Progress;

2.1.4 S-26 Gold;

2.1.5 S-26 Promil Gold;

- 2.1.6 S-26 Progress Gold;
- 2.1.7 Promise Picky Eater;
- 2.1.8 Promise Picky Eater Gold;
- 2.1.9 SMA;
- 2.1.10 Infasoy;
- 2.1.11 S-26 Low Birth Weight;
- 2.1.12 S-26 LF;
- 2.1.13 S-26 AR Gold;
- 2.1.14 S-26 HA Gold;
- 2.1.15 S-26 PDF Gold.

(the “divested brands”)

The license will provide for the exclusive use of the licensed trademarks in connection with the manufacture, packaging, sale, offering for sale, marketing, promotion, advertising, disposition and distribution of the infant nutrition products in the divested area.

- 2.2 An exclusive 10 year license to the product formulations for the divested brands sold in the divested area, followed by a non-exclusive license on a perpetual basis.
- 2.3 A non-exclusive perpetual license in the divested area to process technology with respect to the divested brands. For the avoidance of doubt, the technology licence would allow the proposed purchaser to:
 - (i) manufacture, package, sell, offer for sale, market, promote, advertise, dispose and distribute products in South Africa under any brand;
 - (ii) manufacture and package those products outside of South Africa for sale within South Africa; and
 - (iii) make modifications and improvements to the licensed product formulations for use in South Africa and the process technology.
- 2.4 Nestlé must provide the proposed purchaser with developments to process technology for a period of 5 years following the date of disposal. The developments to process

technology are to be provided at regularly scheduled intervals and as agreed to by Nestlé and the proposed purchaser.

- 2.5 Nestlé must provide the proposed purchaser with detailed information in respect of key or unique product ingredients, including the sources of supply of such product ingredients used in the divested products or pipeline products and must not engage in any conduct that hinders the proposed purchaser's access to key or unique product ingredients used in the divested products or pipeline products.
- 2.6 Nestlé must provide the proposed purchaser with copies of clinical trial results and product trial results in respect of the divested products and pipeline products as previously conducted by Pfizer Nutrition prior to the clearance date or conducted by Nestlé in relation to the divestiture products and pipeline products for 5 years post clearance, which includes product test results and which will permit the proposed purchaser to use such clinical trial results and product trial results in the normal course of conducting its business within the divested areas. It is recorded that the duration of the access to clinical trial results and product test results shall not be for a period longer than 5 years from the date of disposal and that the licensee shall be granted a non-exclusive perpetual license to the clinical trial results and product trial results with respect to the divested products and carried out during the 5 year period post clearance within the divested area.
- 2.7 Nestlé shall also transfer all documents, data, information and materials acquired by Nestlé on the clearance date sufficient to reflect existing clinical trial results and product trial results conducted in respect of the divested products or company that formed part of the divested products as previously conducted by Pfizer Nutrition prior to the clearance date.
- 2.8 Nestlé will provide the proposed purchaser with reasonable access to appropriate Nestlé representatives and technical assistance to assist the proposed purchaser with the interpretation and understanding of clinical trial results and product trial results with respect to the divested products and pipeline products. It is recorded that Nestlé shall make such services available for a period no longer than 5 years from the date of disposal.

- 2.9 Nestlé will provide the prospective purchaser with access to the pipeline products for development and sale in the divested area.
- 2.10 An exclusive license for the term of the rebranding period for the use of the divested brands of the pipeline products in the divested area.
- 2.11 Nestlé will provide the prospective purchaser with a non-exclusive perpetual license in the divested area to process technology with respect to the pipeline products (and outside of the divested area to the extent necessary for the manufacture of pipeline products outside of the divested area).
- 2.12 An exclusive license for the term of the rebranding period to the product formulations for the pipeline products sold in the divested area, followed by a non-exclusive perpetual license.

Tangible assets

- 2.13 Nestlé will transfer the following:
 - 2.13.1 All tangible assets (including the inventory of finished products and packaging components specific to the divested business);
 - 2.13.2 All tangible assets including inventory used or intended for use in connection with the divested business, being finished goods, packaging, advertising, and marketing materials, catalogues, stationary and items in transit from a supplier or to a customer or on consignment with a customer owned by the divested business;
 - 2.13.3 All customer and vendor lists, business, financial and legal records, books, documents, literature, files, information and materials to the extent any of the foregoing are used solely in the divested business and relate solely to such customers and vendors of the divested business;

2.13.4 All permits, licenses, consents, planning permissions, product registrations, certifications or authorizations issued by a government agency and related documentation used solely in connection with the divested business;

2.14 Nestlé will use its reasonable commercial endeavours to novate or assign all contracts, sales orders, purchase orders, instruments and other commitments, obligations and arrangements relating solely to the divested business subject to the terms and conditions of the agreements in question and to third party consents;

2.15 Nestlé will sell the following assets:

2.15.1 All advertising, marketing, sales and promotional materials solely related to the divested business and located within the divested area to the proposed purchaser;

2.15.2 Any equipment, personal computers, vehicles and other tangible assets used solely in the divested business

2.16 Nestlé will use its reasonable endeavours to ensure that the Pfizer Nutrition employees are transferred to the proposed purchaser by the date of disposal and in a manner consistent with section 197 of the Labour Relations Act. In this regard Nestlé must:

2.16.1 Not directly or indirectly discourage any Pfizer Nutrition employee from commencing, continuing or seeking employment with or providing services to the proposed purchaser;

2.16.2 Take all reasonable steps to ensure that Pfizer does not directly or indirectly discourage any Pfizer Nutrition employee from commencing, continuing or seeking employment with or providing services to the proposed purchaser;

2.16.3 Take all reasonable steps to ensure that Pfizer does not redeploy any Pfizer Nutrition employee to any other business operated by Pfizer until the date of disposal;

2.16.4 Take all reasonable steps to ensure that Pfizer, effective on the date of disposal, releases the Pfizer Nutrition employees from any obligations to provide services to Pfizer;

- 2.16.5 Take all reasonable steps to ensure that Pfizer, effective on the date of disposal, releases the Pfizer Nutrition employees from any non-compete or similar restraint of trade obligation, to the extent that such an obligation would otherwise prevent the person from performing his or her contemplated role in relation to the divested business;
- 2.16.6 Not procure, promote or encourage the transfer of any of the Pfizer Nutrition employees from the proposed purchaser to Nestlé for a period of 2 years after the date of disposal; and
- 2.17 Pfizer Inc must not procure, promote or encourage the transfer of any of the Pfizer Nutrition employees from the proposed purchaser to Pfizer for a period of 2 years after the date of disposal of the divested business.
- 2.18 Transitional real estate arrangements may be entered into whereby the proposed purchaser may continue to utilize a portion of Pfizer Nutrition's premises in Sandton, Johannesburg, which is shared with other Pfizer business operations. This will also include a 12 month transitional services agreement with respect to the premises that are currently used by Pfizer's employees.
- 2.19 At the option of the proposed purchaser, a transitional at cost supply agreement may be entered into between the prospective purchaser and Nestlé. The supply agreement shall be for the divested products (and the pipeline products in so far applicable) and shall be for a time period agreed to by the prospective purchaser and Nestlé and shall commence on the date of disposal. It is recorded that the transitional cost supply agreement shall be for a period no longer than 3 years from the date of disposal.
- 2.20 For the avoidance of doubt, although the divested area is limited to South Africa, Nestlé intends to offer the proposed purchaser a package which will include the infant nutrition businesses of Pfizer Nutrition in the following jurisdictions:
- 2.20.1 Botswana;
- 2.20.2 Namibia;
- 2.20.3 Zambia;

- 2.20.4 Lesotho;
- 2.20.5 Swaziland; and
- 2.20.6 Australia.

3. TIME PERIODS

- 3.1 Nestlé shall find a proposed purchaser for the divested business and enter into a licensing agreement and a sale agreement in respect of the divested business within the divestiture period. This period may be extended upon written request by Nestlé to the Commission for a period not exceeding three (3) months on **“good cause shown”**. For the purpose of this clause **“good cause shown”** means circumstances that could not have reasonably been foreseen by the merging parties at the time the clearance certificate was issued. This request must be made in writing to the Commission no later than a month before the expiry of the divestiture period and the Commission’s consent may not be unreasonably withheld.
- 3.2 Upon receipt of the written approval by the Commission of the proposed purchaser, the proposed purchaser and Nestlé must conclude a licensing agreement and a sale agreement and, to the extent and in the manner required by the Act, notify the proposed transaction to the Commission, at which time the divestiture period shall, be suspended, pending the approval of the proposed transaction by the Commission or the Tribunal.
- 3.3 Nestlé will use all reasonable endeavours to complete the transfer of ownership of the divested business (and related licensing of the divested brands) as soon as possible after the approval of the transaction by the Competition Commission or the Competition Tribunal.
- 3.4 If Nestlé is unable to secure a proposed purchaser in respect of the divested business within the divestiture period or the extended period as the case may be, then the Trustee will have an exclusive mandate and a power of attorney to sell the divested business during the Trustee divestiture period at no minimum price. The specific details of the Trustee’s mandate are annexed hereto marked “Y”.

- 3.5 Notwithstanding the provisions of clause 3.3, the Trustee shall use all reasonable endeavours to ensure that any sale and related licensing agreements concluded in respect of the divested business with the proposed purchaser shall be at the best possible commercial terms.
- 3.6 Once the sale agreement has been concluded, Nestlé must use all reasonable endeavours to ensure that it and the related licensing agreements becomes unconditional and that it is implemented as soon as possible after the date of signature thereof. This shall be included as a provision in the sale agreement.
- 3.7 Should the Trustee fail to dispose of the divested business within the 3-month period, the Trustee may apply to the Tribunal for a further 3-month extension, on good cause shown.
- 3.8 Upon receipt of the written approval by the Commission of the proposed purchaser during the Trustee divestiture period, the Trustee must, to the extent and in the manner required by the Act, notify the proposed transaction to the Commission, at which time the Trustee divestiture period shall, be suspended, pending the approval of the proposed transaction by the Commission or the Tribunal.

4. UNDERTAKINGS BY THE MERGING PARTIES

- 4.1 The merging parties undertake, to the extent within their respective auspices, to do the following in respect of the divested business:
- 4.1.1 Preserve and maintain the economic and competitive value of the divested business until the date of disposal in accordance with good commercial practice and to manage the divested business in the best interest of such business;
- 4.1.2 Manage the divested business in the ordinary course of business with reasonable care and skill, pursuant to good business practices until the date of disposal;
- 4.1.3 Provide sufficient resources for the maintenance of the divested business, including implementing appropriate ongoing marketing of the divested brands in accordance with any current approved strategic business plan and current marketing budget for the

divested business, until the earlier of the date of disposal or the end of the Trustee divestiture period;

- 4.1.4 Refrain from carrying out any act that may reasonably be expected to have a significant adverse impact on the economic value, the management, or the competitiveness of the divested business;
- 4.1.5 Refrain from carrying out any act that may be of such a nature as to, in a significant adverse way, alter the economic value of the divested business or which could alter the commercial strategy in respect of such business in a significantly adverse way;
- 4.1.6 Nestlé undertakes to introduce a retention plan to the employees of Pfizer Nutrition South Africa in order to incentivise employees to remain with the Pfizer Nutrition business in South Africa. The said retention plan will cover the Pfizer Nutrition employees until 6 months after the date of disposal;
- 4.1.7 Commit, from the clearance date until the date of disposal, to keep the divested business separate from the retained business and to ensure that the personnel of the divested business – including the Hold Separate Manager(s) – remain independent and have no involvement in any business retained and vice versa, and shall ensure that all the personnel including the Hold Separate Managers do not report to any individual (apart from the Trustee) outside the divested business;
- 4.1.8 Until date of disposal, assist the Trustee in ensuring that the divested business is managed as a distinct and saleable entity separate from the businesses retained by the merging parties. Nestlé shall appoint not more than 2 Hold Separate Manager(s) who shall be responsible for the management of the divested business, under the supervision of the Trustee. The Hold Separate Manager(s) shall manage the divested business independently and in the best interest of the business with a view to ensuring its continued economic viability, marketability and competitiveness and its independence from the businesses retained by Nestlé;
- 4.1.9 Nestlé shall implement all necessary measures to ensure that they do not after the clearance date obtain, except as required to perform any obligations pursuant to the

terms of this order, any business secrets, know-how, commercial information, sensitive competitive information, or any other information of a confidential or proprietary nature relating to the divested business. Nestlé may obtain information relating to the divested business which is reasonably necessary for the divestiture of the divested business or whose disclosure to Nestlé is required by law.

4.2 Nestlé also undertakes not to:

4.2.1 Re-introduce any of the divested brands in the divested area during the black-out period. Such commitment shall not prevent Nestlé from making use of the divested brands as necessary to maintain any registrations for the divested brands within the divested area;

4.2.2 License to any third party the divested brands for use in the divested area for a period of 20 years following the date of disposal;

4.2.3 Use "S-26", "SMA", "Infasoy" or any other brand name or logo that can reasonably be associated with the divested brands (and pipeline products) in the divested area for a period of 20 years following the date of disposal;

4.2.4 Introduce in the divested area new products with such non-material variations to the formulations of the divested products that they are effectively the same as the divested products; or

4.2.5 Introduce in the divested area new products using the formulations of the divested products and to which Nestlé has added a new ingredient that would be a material variation to the formulations of the divested products.

4.3 For the avoidance of doubt nothing in this order shall prevent Nestlé from:

- (a) supplying its existing range of infant nutrition products in South Africa; or
- (b) introducing or supplying new infant nutrition products in South Africa, provided Nestlé complies with clauses 4.2.1 to 4.2.5.

4.4 Nestlé shall not be in breach of its obligations under clauses 4.2 merely because its infant nutrition products supplied in South Africa contain the required ingredients

pursuant to the Foodstuffs, Cosmetics and Disinfectants Act, No. 54 of 1972 and the regulations thereto.

- 4.5 For a period of ten years following the clearance date, Nestlé shall not disparage or attempt to disparage the proposed purchaser or subject to clause 4.3(b), make any reference to the divested brands or the divested business when Nestlé is marketing, promoting, or selling any new Nestlé infant nutrition product to a third party in the divested area, unless:

(a) The reference is with respect to price; or

(b) The reference is to the range of available infant nutrition products in that category and the reference does not single out any of the divested brands or any product within the divested business.

- 4.6 For the avoidance of doubt, nothing in the order shall prevent Nestlé from:

(a) Marketing, promoting or selling new infant nutrition products in or into the divested area or from highlighting the benefit of such products;

(b) Making reference to the divested brands or any product within the divested brands when Nestlé is marketing, promoting, or selling any existing infant nutrition products supplied by Nestlé in the divested area at the date of disposal;

- 4.7 For the avoidance of doubt, reactively answering, or responding to, (in the ordinary course of business) any consumer or health care professional enquiries is included in the conduct of marketing, promoting and selling as described in paragraphs 4.6 (a) and 4.6 (b) above.

- 4.8 Nestlé also hereby undertakes that there will be no retrenchments or employment losses as a result of the acquisition of Pfizer Nutrition or as a result of the proposed transaction.

5 APPOINTMENT OF TRUSTEE

- 5.1 Nestlé shall appoint an independent Trustee, subject to the prior written approval of the Commission, to ensure that the divested business is managed in the ordinary course of business, pursuant to good business practice.
- 5.2 The Trustee shall be independent of the merging parties, possess the necessary qualifications to carry out its mandate, and shall neither have nor become exposed to a conflict of interest.
- 5.3 Nestlé shall provide a comprehensive and duly executed power of attorney to the Trustee from the date of the Trustee's appointment.
- 5.4 This power of attorney will take effect on the first day of the Trustee divestiture period.
- 5.5 A certified copy of the power of attorney shall be submitted to the Commission within 5 days of the Trustee's appointment.
- 5.6 The power of attorney, which shall be consistent with the Trustee mandate and acceptable to the Commission, shall enable the Trustee to perform all actions which the Trustee considers necessary or appropriate, including the power to appoint advisors, to litigate for enforcement of this divestiture and to execute the Trustee mandate attached hereto.
- 5.7 The power of attorney shall include the authority to grant sub-powers of attorney to the members of the trustee's team.
- 5.8 Any power of attorney granted by Nestlé, including any sub-powers of attorney granted pursuant to them, shall expire on the earlier of the termination of the Trustee's mandate, termination of the Trustee's divestiture period or the discharge of the Trustee.
- 5.9 Nestlé shall propose a Trustee for the Commission's approval within ten days from the clearance date.
- 5.10 The proposal shall contain sufficient information for the Commission to determine whether the Trustee is suitable to execute the Trustee mandate attached hereto and

shall include *inter alia* the proposed Trustee's contact details, experience, references and employment history.

- 5.11 The Trustee's, the trustee's team and the Trustee's partner firms' relationship with the merging parties for the previous 12 months must be disclosed to the Commission in writing.
- 5.12 The Commission shall have the discretion to approve or reject the proposed Trustee. Such approval shall not be unreasonably withheld. Should the Commission reject the proposed Trustee, the Commission must provide written reasons to Nestlé explaining the reasons for the rejection of the proposed Trustee.
- 5.13 Nestlé shall appoint the trustee within 5 days of the Commission's written approval of said Trustee.
- 5.14 If the proposed Trustee is rejected, Nestlé shall submit the names of at least two more proposed trustees within 5 days of being informed of the rejection. The Commission shall choose which of these Trustees it wishes to have appointed, provided the Trustee is suitable for the position.
- 5.15 If the Commission, acting reasonably, rejects all further proposed Trustees, the Commission shall nominate a Trustee, whom Nestlé shall appoint, or cause to be appointed within 5 days of being informed by the Commission of such Trustee's identity.
- 5.16 All reasonable costs incurred by the Trustee and/or the trustee team shall be for Nestlé's account, which costs shall be settled by Nestlé on demand of the Trustee.

6 THE PURCHASER

In order to ensure the immediate restoration of effective competition, the proposed purchaser, in order to be approved by the Commission, must:

- 6.1 Be independent and not related to the Nestlé or any directly or indirectly affiliated member of the corporate group.

- 6.2 Possess the necessary financial resources, proven expertise and the incentive to maintain and develop the divested business as a viable and active competitive force in competition with Nestlé or any directly or indirectly affiliated member of Nestlé and other competitors.
- 6.3 Obtain all necessary approvals from the Commission and other South African regulatory authorities for the acquisition of the divested business (taking into account any remedies that might be offered).
- 6.4 Provide the Commission with an affidavit deposed to by a senior official of the proposed purchaser confirming the accuracy of all information relating to the proposed purchaser and which is provided to the Trustee and the Commission.
- 6.5 In order to maintain the structural effect of this order, Nestlé or any directly or indirectly affiliated member of its corporate group, will not subsequently directly or indirectly re-acquire influence or control over the whole or part of the divested business.

7 PRIOR APPROVAL BY THE COMPETITION COMMISSION

- 7.1 When Nestlé has reached an agreement with a proposed purchaser it will submit to the Trustee and the Commission a fully documented and reasoned proposal enabling the Commission to:
 - 7.1.1 Verify in consultation with the Trustee that the proposed purchaser is a suitable purchaser of the divested business.
 - 7.1.2 Confirm that the divested business is being sold in a manner consistent with the divestiture conditions.
 - 7.1.3 Grant any approvals required under these commitments with respect to any ancillary arrangements.

- 7.2 Such a proposal shall be submitted no later than one month prior to the end of the divestiture period and shall include copies of the draft and/or final sale agreement and all other ancillary agreements and/or other documents related to the proposed divestment.
- 7.3 The Commission will approve or reject the merging parties' proposal in writing. The approval of the proposal shall not be unreasonably withheld.

8 DUTIES AND OBLIGATIONS OF THE PARTIES DURING THE TRUSTEE DIVESTITURE PERIOD

- 8.1 If Nestlé is not able to find a suitable purchaser or to transfer the divested business to an approved purchaser within the divestiture period, the Trustee shall have an exclusive mandate with the necessary power of attorney to secure a proposed purchaser and sell the divested business at no minimum price.
- 8.2 At the expense of Nestlé, the Trustee may appoint advisors (in particular for corporate finance or legal advice), subject to Nestlé's approval, which approval shall not be unreasonably withheld or delayed, if the Trustee considers the appointment of such advisors necessary or appropriate for the performance of its duties and obligations under the Trustee mandate, provided that any fees and other expenses incurred by the Trustee are reasonable.
- 8.3 If Nestlé refuses to approve the advisors proposed by the Trustee, the Commission may approve the appointment of such advisors, after having heard Nestlé's objection thereto.
- 8.4 Nestlé will indemnify the Trustee, its employees and members of the trustee team (each an "Indemnified Party") and hold each indemnified party harmless against any liabilities arising out of the performance of the Trustee's duties under this order, except to the extent that such liabilities result from the wilful default, recklessness, gross negligence of the Trustee, its employees or members of the trustee team.

9 NOTIFICATION OF IMPLEMENTATION OF THE TRANSACTION

The merging parties and Pfizer Inc. may implement the South African leg of the transaction notified to the Commission under case no. 2012June0326 (CT Case no.65/LM/12) on the clearance date, subject to the appointment of the Trustee as provided for in clause 5 of this order.

10 JURISDICTION

All parties to this order agree that litigation for any enforcement of this order, whether by the Trustee or any other party, may take place in the Tribunal or the North Gauteng High Court, Pretoria, as applicable, and that they submit themselves to the jurisdiction of the Tribunal / High Court and any appropriate appeal court. The parties agree to the overseas execution of any order granted, as far as legally permissible without further judgement of a foreign court, and will take all reasonable steps to ensure swift overseas execution of any order granted by the Tribunal or High Court.

11 CONFIDENTIALITY

11.1 Save for the time periods in which the Tribunal requires Nestlé to dispose of the divested business and the Confidential Schedule, the contents of this "Annexure X" are not confidential.

11.2 The entire document "Annexure Y", the Trustee mandate, is confidential.

Confidential Schedule – Pipeline Products

- S26 1 Milk Formula Tin 1.7kg;
- S26 2 Promil Formula Tin 1.7kg;
- S26 3 Progress Formula Tin 1.7kg;
- S26 LF Gold 400g;
- S26 Comfort Gold 400g; and
- S26 Comfort Gold 900g

ANNEXURE “Y”

TRUSTEE’S MANDATE

1. INTRODUCTION

- 1.1. The Trustee shall act on behalf of the Commission to ensure Nestlé’s compliance with the terms of Annexure X of the Tribunal’s order.
- 1.2. The key objective of the appointment of the Trustee is for the Trustee to oversee the operations of the divested business and to take such steps as may be required to ensure that the divested business is managed and maintained in the ordinary course of business as a competitive force pending divestiture and the license agreement, and that it is licensed or disposed to a proposed purchaser who meets the Commission’s criteria as set out in clause 6 of “Annexure X”, in a format which enables continued competition in the relevant markets. The Trustee will perform its duties mentioned above, and as contained in this Trustee Mandate, in respect of the Tribunal’s order.

2. DUTIES OF THE TRUSTEE

- 2.1 The Trustee shall until the termination of his mandate carry out the following duties:
 - 2.1.1 Monitor the steps that Nestlé is taking to maintain the continued economic viability, competitiveness and marketability of the divested business and to ensure that it is managed in the ordinary course of business, pursuant to good business practice.
 - 2.1.2 Observe and advise the Commission as to the development of the procedure for selecting the proposed purchaser for the divested business and as to the conduct of the negotiations between the Nestlé and the proposed purchaser.

- 2.1.3 Observe and advise the Commission as to whether the proposed purchaser with whom Nestlé intends to negotiate are likely to satisfy the Commission's requirements as set out in clause 6 of this order.
- 2.1.4 Enforce the obligations of the merging parties, as contained in clause 4 of Annexure X, during the divestiture period and thereafter, until legal title and control of all elements of the divested business have been properly passed to the purchaser.
- 2.1.5 The Trustee's duties set out above may not be extended or varied in any way by the merging parties, save with the express written consent of the Commission.

3 REPORTING OBLIGATIONS OF THE TRUSTEE PRIOR TO THE TRUSTEE DIVESTITURE PERIOD

- 3.1 A detailed work plan describing how the Trustee intends to monitor compliance with the obligations and conditions attached to the order must be drawn up in consultation with the merging parties and submitted to the Commission within 10 days of the Trustee's appointment.
- 3.2 Within 10 days from the end of each calendar month, or as otherwise agreed with the Commission, the Trustee shall submit a written progress report to the Commission, sending the Hold Separate Managers, and subject to a confidentiality undertaking the designated recipients within Nestlé, and the designated recipients within Pfizer Inc., a copy at the same time.
- 3.3 The report shall cover the Trustee's progress in the fulfilment of his/her obligations under the mandate and the compliance of Nestlé with the conditions and obligations imposed upon it in Annexure "X".
- 3.4 The report shall cover in particular the following topics:
 - 3.4.1 The operational and financial performance of the business to be divested, assessed during any particular time period;

- 3.4.2 Monitoring of the preservation of the economic viability, marketability and competitiveness of the business to be divested;
- 3.4.3 A list of proposed purchasers and a preliminary assessment of each of them;
- 3.4.4 The state of negotiations with proposed purchasers;
- 3.4.5 Any issues or concerns regarding the licensing of the divested business including any issues and concerns regarding the negotiation of the license agreement.
- 3.4.6 Nestlé's compliance with any strategic business plan and budget for the divested business;
- 3.4.7 Motivation for the utilisation, associated costs and details of professional advisors appointed by the Trustee;
- 3.4.8 Any particular issue as set out in the work plan;
- 3.5 Throughout the term of the Trustee's appointment, if at any time the Trustee has any reason to doubt the merging parties' full compliance with any or all of the merging parties' obligations in terms of Annexure "X" of the Tribunal order, the Trustee shall immediately advise the merging parties, Pfizer Inc. and the Commission in writing of such doubts or concerns and make recommendations to the merging parties and the Commission regarding how such doubts or concerns may be remedied without delay.
- 3.6 The abovementioned doubts or concerns as well as related recommendations and progress in their implementation must be contained in the written progress report referred to in clause 3.2.

4 ASSISTANCE BY THE MERGING PARTIES TO THE TRUSTEE

- 4.1 The merging parties shall provide to the Trustee, or cause to be provided, all reasonable assistance and information required by the Trustee to carry out this mandate, including copies of all relevant documents and access to appropriate personnel.

- 4.2 The merging parties shall cover all their own expenses arising from the provision of such assistance.
- 4.3 The merging parties shall be responsible for the performance of their employees and agents and for the accuracy and completeness of all data and information provided to the Trustee.
- 4.4 The merging parties shall provide the Commission with affidavits deposed to by a senior official of each of the merging parties confirming the accuracy of all information provided to the Trustee.

5 TRUSTEE DIVESTITURE PERIOD

- 5.1 For purposes of this Trustee mandate the divestiture period shall be the applicable time periods specified in Annexure "X".
- 5.2 In the event that Nestlé fails to secure a proposed purchaser and/or transfer legal title of the divested business within the divestiture period, the Trustee shall execute his mandate in accordance with the power of attorney referred to in clause 5.3 of Annexure "X".
- 5.3 Should the Trustee sell the divested business during the Trustee divestiture period, the remuneration package of the Trustee may not provide for a success premium that is linked to the final sale value of the divested business.
- 5.4 The proposed purchaser shall fulfil the purchaser requirements as set out in clause 6 of Annexure "X".
- 5.5 The licensing agreement shall be approved by the Commission in accordance with the procedure laid down in clause 7 of Annexure "X".
- 5.6 The Trustee shall comply with the Commission's instructions with regards to any aspect pertaining to the negotiation and/or conclusion of the license agreement. In particular, the

Trustee shall comply with the Commission's instruction to suspend all negotiations with any proposed purchaser with immediate effect.

6. REPORTING OBLIGATIONS OF TRUSTEE DURING THE TRUSTEE DIVESTITURE PERIOD

- 6.1 A detailed work plan describing how the Trustee intends to divest of the business must be drawn up within 10 days from the commencement of the Trustee divestiture period and submitted to the Commission, the merging parties and Pfizer Inc.
- 6.2 Within 10 days from the end of each calendar month, or as otherwise agreed with the Commission, the Trustee shall, for the duration of the Trustee divestiture period, submit a comprehensive written report to the Commission, sending the merging parties and Pfizer Inc. a copy at the same time.
- 6.3 The report shall cover the Trustee's progress of the divestiture process and in particular the following topics:
 - 6.3.1 A list of proposed purchasers and a preliminary assessment of each of them;
 - 6.3.2 State of negotiations with proposed purchasers;
 - 6.3.3 Any issues or concerns regarding the sale of the divested business including any issues and concerns regarding the negotiation of the license agreement;
 - 6.3.4 Motivation for the utilization, associated costs and details of professional advisors appointed by the Trustee;
 - 6.3.5 Any particular issues as set out in the work plan.

7. CONFIDENTIALITY

- 7.1. The Trustee's reports will be confidential and for the sole use of the addressees, who shall be the Commission, Hold Separate Managers, and subject to a confidentiality undertaking the designated recipients within Nestlé, and the designated recipients within Pfizer Inc.
- 7.2. The Trustee's reports shall be independently prepared on the basis of the information and documents provided to the Trustee and shall reflect the Trustee's assessment of such information and documentation.
- 7.3. The Trustee shall present the draft reports to the merging parties and Pfizer Inc. in advance of its submission to the Commission in order that these parties may review the factual content of the report and provide their comments.
- 7.4. Any unresolved disagreement between the Trustee and these parties concerning the content of the draft report must be noted in the final report submitted to the Commission.

8. ESTIMATED FEES AND EXPENSES

- 8.1 Nestlé shall pay the Trustee's reasonable fees and expenses on the terms and conditions agreed upon in writing between Nestlé and the Trustee.

9. REPLACEMENT , DISCHARGE AND RE-APPOINTMENT OF TRUSTEE

- 9.1. The Commission may at any time, after consultation with the Trustee, order Nestlé to remove the Trustee, if the Trustee has not acted in accordance with the Trustee mandate or for any reason advanced by the Commission.
- 9.2. The new Trustee shall be appointed in accordance with the procedure referred to in clause 5 of Annexure "X".

10. TERMINATION OF THE MANDATE

- 10.1 The mandate will automatically terminate upon completion by the Trustee of the obligations under this mandate, subject to the written approval of the Commission.