JOINT TO SOLE CONTROL – AS YOU WERE OR AS YOU WILL BE?

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Abstract:

The acquisition of sole control is often preceded by the acquisition of joint control in a target firm post-merger. Firms often find themselves in a challenging situation when notifying the proposed merger that results in this transition from joint to sole control. This occurs as the positions taken during the notification of the acquisition of joint control often make the acquisition of sole control more onerous. For instance, the standard argument proffered to Competition Authorities when such an acquisition is notified is that there is little or no management control in the target firm post-merger. This argument is not best placed when advancing a strong case for the transition from joint to sole control as it is quite likely to result in a comprehensive assessment being undertaken by the Competition Authorities.

The Competition Authorities in South Africa have evaluated an increasing number of these joint to sole control merger scenarios. This paper aims at providing insights from three of the leading cases dealing with this issue including the more recent *Life Healthcare / Joint Medical Holdings* matter. The analysis specifically focuses on evaluating the approach taken by the Competition Authorities together with a comparative analysis on any developments or shifts in their approach. There is also a focus on insights from the European Commission's approach in evaluating these merger control scenarios where relevant. Finally, the implications of the shift from joint to sole control are explored in terms of the competitive assessment of the proposed merger.

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INTRODUCTION

A merger usually involves the acquisition of the entire issued share capital of a firm. This is often a stepped process with the initial acquisition of a partial interest followed by the acquisition of the majority or the entire interest in another firm. In principle, this appears to be a simple process but like many fields of competition law and economics, practical application may in some instances prove similar to opening "Pandora's Box" for both competition authorities and practitioners alike. The aim of this paper is to provide a clear analysis of the move from joint to sole control by focusing on three leading cases that have dealt with this issue at the Competition Tribunal ("the Tribunal"). These are the:

(i) Naspers Ltd ("Naspers") / Electronic Media Network Ltd ("M-Net") and SuperSport International Holdings Ltd ("Supersport")[2],

(ii) Media24 Limited and Paarl Coldset (Pty) Ltd ("Media24") / Natal Witness Printing and Publishing Company ("Natal Witness")[3], and

(iii) Life Healthcare Group (Pty) Ltd ("Life Healthcare") / Joint Medical Holdings Ltd ("JMH")[4] decisions.

In doing so, a framework is provided for analysing the various forms of control together with the assessment of the competitive effects of a proposed merger from joint to sole control. Where relevant insights from the European Commission's ("ECs") approach in determining control based on its guidelines[5] are also included. Assessments of the key principles that have emerged from the three leading cases outlined above together with supporting insights then follows and a conclusion is then reached with a summary of the implications for the competitive assessment of mergers.

TERMINOLOGY AND FORMS OF CONTROL

This field of competition law like many others is replete with its own set of terminology. Some of this terminology is rooted in company law which has evolved in its application to competition law. It is therefore important to understand the common terminology that has been used by competition authorities in South Africa and abroad to describe control and the various forms of control.

Managerial or Operational control

In some instances, control is referred to as 'Managerial' or 'Operational' control in the case where a firm or shareholder irrespective of their shareholding is responsible for the day-to-day management of a given firm.

> For example, in the Naspers Ltd ("Naspers") / Electronic Media Network Ltd ("M-Net") and SuperSport International Holdings Ltd ("Supersport") decision[6], the Competition Tribunal found that "Naspers exercises managerial control over M-Net/SuperSport,

[2] Case number: 23/LM/Feb07.
[3] Case number: 15/LM/Jun11.
[4] Case number: 74/LM/Sep11.
[5] Refer European Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (2008/C 95/01).
[6] Case number: 23/LM/Feb07.

however both Naspers and Johncom, through their respective interests and shareholding arrangements, jointly control M-Net/SuperSport".[7]

Negative vs. Positive control

A distinction is often drawn by competition authorities between the right to make strategic commercial decisions and the right to block these strategic commercial decisions. Rights to block strategic commercial decisions are commonly referred to as 'veto rights' and are derived from minority protections for firms or shareholders.[8]

For example, in the Sun International Limited ("Sun International") / Real Africa Holdings Limited ("Real Africa Holdings") decision[9], the Tribunal found that Sun International exercised "negative control by virtue of minority protections" in various subsidiaries of Real Africa Holdings.[10] Through the proposed transaction, it was held that Sun International "will acquire *sole positive* control" over each of the subsidiaries and will be able to vote the majority of votes that may be cast in general meetings of these companies.[11]

***De facto* vs. *de jure* control**

In simple terms, *de facto* control refers to a situation in which a firm or shareholder generally holds sole control in practice (on the facts) but not in terms of the law. *De facto* control relates to the ability of a firm or shareholder to materially influence the policy of a firm in order to exercise sole control. *De jure* control refers to control in terms of the law and specifically in terms of the provisions of section 12(1) and (2)(a) to (f) of the Competition Act.[12]

In terms of the Life Healthcare Group (Pty) Ltd ("Life Healthcare") / Joint Medical Holdings Ltd ("JMH") decision[13], the Tribunal found that Life Healthcare had held *de facto* control of JMH since 1997. Despite the other shareholders being represented through directors on the board of JMH, there was no evidence that these directors ever constrained the control of Life Healthcare. Therefore the Tribunal found that the proposed merger served to bring the *de jure* situation in line with the *de facto* situation as Life Healthcare would control the majority of votes at the board level and at general meetings.[14]

The European Commission ("EC") also recognises that control can be established on either a *de facto* or *de jure* basis. This is true both in the cases of sole and joint control.[15]

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[7] Case number: 23/LM/Feb07 at para.4.

[8] Refer European Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (2008/C 95/01) at para. 54. The European Commission describes negative sole control as follows, "a situation also conferring sole control exists where only one shareholder is able to veto strategic decisions in an undertaking, but this shareholder does not have the power, on his own, to impose such decisions."

[9] Case number: 41/LM/Apr06.

[10] Case number: 41/LM/Apr06, table on p.3.

[11] Case number: 41/LM/Apr06, at para.7.

[12] The Competition no. 89 of 1998 as amended.

[13] Case number: 74/LM/Sep11.

[14] Case number: 74/LM/Sep11, at para. 46.

[15] Refer European Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (2008/C 95/01) at para.s. 55 and 63.

The various forms of control from the perspective of the acquiring firm are now explored below:

No control

This is normally referred to as, 'a passive shareholding' in which a firm or shareholder holds neither voting rights at board level nor veto rights. This typically involves the acquisition of a minority shareholding (less than 50%) in a firm. For example in the initial Primedia Ltd ("Primedia"), Capricorn Capital Partners (Pty) Ltd ("Capricorn") / New Africa Investments Ltd ("Nail") decision[16], the Tribunal found that Nail (after being acquired by Primedia) post-merger, "will not be able to command the majority of votes at shareholders meetings or at meetings of the board. Nail is neither the largest shareholder nor is its assent required to approve any resolution nor can it veto any resolution".[17] The Tribunal therefore concluded that Primedia held no form of control over Nail post-merger.

Joint Control

This refers to the right to vote on strategic commercial decisions and appointments at the board level in equal proportions as the other shareholder or shareholders combined. This typically involves the acquisition of interest resulting in a shareholding of 50% in a target firm. In practice, however, joint control stems from the rights conferred by the respective shareholding and the exercise of these rights and hence acquisition of more or less than 50% shareholding can still be viewed as constituting joint control in a firm.

> For example, in the Public Investment Corporation Limited ("the PIC") and ADR International Airports South Africa (Pty) Ltd ("ADRIASA") decision[18], the Tribunal found that through the acquisition of ADRIASA's 20% stake in Airports Company of South Africa ("ACSA") the PIC would acquire indirect joint control with the Minister of Transport in ACSA. The Minister of Transport's shareholding was 74.6% with various empowerment groups holding the remaining shares.[19] The acquisition of partial ownership can therefore result in joint control in a target firm.

This is in line with the approach of the EC. More specifically, the EC notes in its guidelines that joint control, "exists where two or more undertakings or persons have the possibility of exercising decisive influence over another undertaking"[20]. It is characterised by the, "possibility of a deadlock situation resulting from the power of two or more parent companies (shareholders) to reject proposed strategic decisions." These shareholders must reach a common understanding in determining the commercial policy of the joint venture and are required to co-operate.

Essentially, there is joint control if the shareholders must reach agreement on major decisions concerning the controlled entity.

Sole Control

This situation is one in which a firm is able to exercise the majority of votes on strategic commercial decisions at the board level and / or appoint the majority of directors to the

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[16] Case number 39/AM/May06 delivered 12th February 2007.
[17] Case number 39/AM/May06 delivered 12th February 2007, at para. 58.
[18] Case number: 108/LM/Nov05.
[19] Case number: 108/LM/Nov05 at p.2.
[20] Refer European Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (2008/C 95/01) at para. 62.

board. This form of control is usually linked to the acquisition of interest resulting in a shareholding ranging from 50% to 100% in a target firm. Sole control may also exist when a firm or shareholder holds *de facto* control over given firm due to the remaining shareholders not acting as a constraining influence at the Board.

> For example, in the Life Healthcare / JMH decision the Tribunal found that despite the other shareholders being represented through directors on the board of JMH, there was no evidence that these directors ever constrained the control of Life Healthcare. This led to the view that Life Healthcare held *de facto* sole control at JMH pre-merger.[21]

The EC notes in its guidelines that, "sole control is acquired if one undertaking can exercise decisive influence on an undertaking".[22] Generally this is where the sole controller enjoys the power to determine the strategic commercial decisions of the undertaking. This power is typically achieved by the acquisition of a majority of voting rights in a company.

> The EC also recognises an additional form of sole control in terms of which "only one shareholder is able to veto strategic decisions in an undertaking, but this shareholder does not have the power, on his own, to impose such decisions".[23] This is referred to as negative sole control and is akin to the position of joint control in terms of which a shareholder has the right to block strategic commercial decision. This form of negative sole control has not yet been recognised in South African jurisprudence.

Application to competitive effects

The appendix contains a summary of the two main categories of competitive effects, namely, unilateral and coordinated effects. A further distinction can be drawn between unilateral price and strategic effects on the basis of some firms or shareholders holding rights to block strategic commercial decisions but being unable to influence pricing or output levels.

In general most mergers involve the assessment of both unilateral (price and strategic effects) and coordinated effects. This is because there is often operational control at the acquiring firm and either operational control at the target firm or other lesser forms of control described earlier. The assessment of coordinated effects will apply to all forms of control at either the acquiring or target firm. However, unilateral price effects may not always apply. This is particularly in instances where there is no operational control at both the acquiring and target firm. Examples may include firms holding negative control at either the acquiring or target firm post-merger. When a firm holds no control in both the acquiring and target firm then neither unilateral price nor strategic effects can apply.

In the context of a merger involving the move from joint to sole control the assessment of the theory of harm relating to both unilateral and coordinated effects is pertinent.

Having understood the various forms of control and the competitive effects, it is appropriate to proceed with the analysis of the key principles emerging from some of the important cases assessed by the Competition Authorities in terms of the move from joint to sole control.

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[21] Case number: 74/LM/Sep11, at para. 46 read with para. 61.

[22] Refer European Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (2008/C 95/01) at para. 54.

[23] Refer European Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (2008/C 95/01) at para. 54.

THE MOVE FROM JOINT TO SOLE CONTROL

This refers to a typical scenario as follows: There exists sole control in the acquiring firm and joint control in the target firm pre-merger and the proposed merger involves the acquisition of sole control in the target firm. The Competition Authorities have analysed an increasing number of mergers focusing on the move from joint to sole control. The three leading cases are considered below. First, an overview of each case is provided. Consideration is then given to the key principles and underlying thinking which have emerged from these cases with regard to the move from joint to sole control.

Overview of the three leading cases

(i) Naspers Ltd ("Naspers") / Electronic Media Network Ltd ("M-Net") and SuperSport International Holdings Ltd ("Supersport")

In the Naspers / M-Net and Supersport decision[24], Naspers was increasing its interest in M-Net and SuperSport from 60.12% to 98.68%[25] post-merger. The remaining shareholders in Naspers were Johncom and Natal Witness Investments (Pty) Ltd ("the Natal Witness") that held 38.56% and 1.32% respectively. Naspers is a media conglomerate that was historically involved in print media and focused on the printing, publishing and distribution of magazines, newspapers and books.[26] M-Net was the first subscription television service in South Africa and broadcasts general and niche entertainment channels. SuperSport's operations include the acquisition, packaging and scheduling of sports related franchising and merchandising, sports competitions, sports package tours and ownership of sport related assets such as professional sports teams.[27]

(ii) Media24 Limited and Paarl Coldset (Pty) Ltd ("Media24") / Natal Witness Printing and Publishing Company ("Natal Witness")

The Media 24 / Natal Witness decision[28] involved Media24 increasing its shareholding in Natal Witness from 50% to 100% post-merger. Media24 is a wholly owned subsidiary of Naspers, whose operations are described above. The relevant business area for the proposed merger related to the print media aspects of Naspers business, specifically the publishing and printing of community newspapers. Natal Witness is a publisher and printer of regional newspapers primarily in Pietermaritzburg and surrounding areas. It also has coldset printing operations in Pietermaritzburg that service the Pietermaritzburg/Durban metropolitan area.[29]

The merging parties argued that the increase in shareholding would result in a shift from joint to sole control for Media 24 in Natal Witness post-merger. As part of the internal restructuring from the proposed merger, the print business of Media24 was planned to be sold to Paarl Coldset, Media 24's printing establishment and part of a wholly owned

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[24] Case number: 23/LM/Feb07.
[25] This was effectively 99.34% as Media24 a subsidiary of Naspers held a 50% interest in the Natal Witness.
[26] Refer to Naspers About us. Available online: http://www.naspers.com/about-naspers.php Last accessed 3rd May 2013. Naspers is now an electronic media company at the time of the proposed merger already held a significant interest subscription television through M-Net and Supersport.
[27] Case number: 23/LM/Feb07 at para.3.
[28] Case number: 15/LM/Jun11.
[29] Case number: 15/LM/Jun11 at para. 16 and 21.

subsidiary of Media24, Paarl Media Group (Pty) Ltd ["Paarl Media"].[30] The other 50% shareholder in Natal Witness was Lexshell 496 Investments (Pty) Ltd ["Lexshell"] which was made up of the Craib family members/trusts.[31]

(iii) Life Healthcare Group (Pty) Ltd ("Life Healthcare") / Joint Medical Holdings Ltd ("JMH")

The Life Healthcare / JMH decision[32] involved an increase in shareholding by Life Healthcare from 49.4% to 70% in JMH. The other shareholders in JMH are individual medical practitioners or their family trusts, deceased estates or companies controlled by medical practitioners ("doctor shareholders"). JMH had approximately 306 of these shareholders, none of which individually held more than 6%.[33] Life Healthcare is one of the three largest hospital groups in South Africa and owns facilities that include hospitals and rehabilitation clinics. JMH owned five hospitals in and around the Durban area.[34]

Key principles

The key principles which have emerged from these cases together with the underlying thinking and commentary are presented below.

I. The possibility of *de facto* control must be assessed pre-merger together with the change in control post-merger

This is the main principle which is identified from the three leading cases outlined above. Each of these three cases highlights particular factors that can be considered in making a determination of *de facto* control pre-merger.

a. The restraining influence of the other shareholder/s in the target firm is important

In the Naspers / M-Net and Supersport decision, the Tribunal found that, "Naspers exercises managerial control over M-Net/SuperSport, however both Naspers and Johncom, through their respective interests and shareholding arrangements, jointly control M-Net/SuperSport. The merger results in a change from joint to sole control. Therefore the proposed transaction entails the acquisition by Naspers of all Johncom's direct and indirect interests in M-Net/SuperSport."[35] This was based on a review of the shareholders agreement of MNH holdings 1998 (Pty) Ltd ["MNH"] that held a 52.6% interest in M-Net/Supersport.[36] This shareholding agreement regulated the relationship between Naspers, Johncom and the Natal Witness in Supersport.

The key point to emerge from the Tribunal's analysis of control was that Naspers' joint and managerial control of M-Net/Supersport was in fact *de facto* control. Although this was not explicitly stated by the Tribunal and argued by the merging parties, the assessment of the mixed bundling potential theory of harm proposed by the intervening party Caxton supports this contention. More specifically:

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[30] Case number: 15/LM/Jun11 at paras. 18 and 32.
[31] Case number: 15/LM/Jun11 at para. 19.
[32] Case number: 74/LM/Sep11.
[33] Case number: 74/LM/Sep11 at para.s. 11.
[34] Case number: 74/LM/Sep11 at para.s. 9 and 10.
[35] Case number: 23/LM/Feb07, at para.4.
[36] MNH's shareholding comprised of 50% by Naspers, 47.5% by Johncom and 2.5% by the Natal Witness.

> Caxton alleged that the proposed acquisition would result in Naspers being able to deploy its powerful position in Pay TV (M-Net/Supersport) to strengthen its already competitive position in the print media market, particularly in the magazine market. The crucial element of this strategy was the removal of Johncom as a restraining influence on Naspers pre-merger.[37] The fact that Johncom held a substantial economic interest in M-Net/Supersport and no interest in Naspers' magazine business meant that it was incentivised to act as this restraining influence.[38]

In addressing this issue neither the merging parties nor the Tribunal raised any concerns with the merger specificity of Caxton's concern on the basis of Naspers exercising *de facto* control over M-Net/Supersport pre-merger. If they had done so, the argument that would then have followed by the merging parties would have been that the proposed acquisition did not result in a change in *de facto* control and hence this theory of harm was not merger specific as Johncom did not restrain Naspers pre-merger. Instead, the merging parties proceeded to provide evidence that this proposed strategy was both irrational from a profit-maximising perspective and impractical to implement.[39] The Tribunal accepted these submissions and unconditionally approved the proposed acquisition which was also in line with the Commission's views.[40]

b. The managerial control of the target firm is a key consideration

In the Media 24 / Natal Witness decision, the Tribunal did not make a finding on whether Media24 exercised *de facto* control of Natal Witness pre-merger as it did not alter their final decision. Their primary focus related to how the proposed transaction changes the merged entities' incentives to act competitively post-merger. Both the intervening party, Caxton and the merging parties argued that Media24 held *de facto* control of Natal Witness pre-merger and this would not change post-merger. However, the Tribunal approached the issues of control and the post-merger incentives with caution based on the disparity in the merging parties' views on control provided below.[41]

During the Tribunal proceedings the merging parties stated that there was an alignment of interest between Media24 and Lexshell in terms of investment in, growth and expansion of the Natal Witness business before the proposed merger. This version of control however, differed significantly from the position on control taken by the merging parties in the merger notification made to the Competition Authorities relating to acquisition of the 50% interest in Natal Witness by Media24.[42] In this previous notification it was submitted that,

> "*Media24 purchased a 50% interest in Natal Witness leaving the management control of Natal Witness with the Craib family. The Craib's have continued to make strategic decisions regarding the Natal Witness (vetted by the board of directors) and conduct the day-to-day management of the business. In effect, there is a large measure of separation between the ownership of Natal Witness and the control exercised by the appointed*

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[37] Case number: 23/LM/Feb07, at para.18.
[38] Case number: 23/LM/Feb07, at para.19.
[39] Case number: 23/LM/Feb07, at para.s. 66, 71, 76 to 83.
[40] Case number: 23/LM/Feb07, at para.s. 84 to 86.
[41] Case number: 15/LM/Jun11 at para.s. 34 to 35.
[42] Case number: 102/LM/Dec04 at para. 4.

managers. Even when the objectives of management and owners of Natal Witness did not coincide in the past, the decision of the Craib's was respected."[43]

The Tribunal also emphasised that in terms of the Natal Witness shareholder's agreement, "Craib is entitled to appoint the managing director of the company, and provides that Craib and the managing director are responsible for the day-to-day management of Natal Witness."[44] The merging parties were unable to reconcile these differing versions of control during the Tribunal proceedings. The proposed merger was conditionally approved with a focus on regulating Media24's interest in Africa Web Printers ("Africa Web"), a coldset newspaper printer in Kwazulu-Natal, post-merger and notification of any small mergers in the relevant product and geographic markets.[45] Greater detail on these conditions is provided in the section that follows. The Commission had recommended a conditional approval of the proposed acquisition and when the Tribunal proceedings were nearing completion the views of the Tribunal aligned with those of the Commission.[46]

c. Historical voting records are useful indicators

In the Life Healthcare / JMH case, Life Healthcare argued that since they acquired a 25% shareholding in JMH in 1997, they exercised *de facto* but not *de jure* control over JMH. *De facto* control is recognised in terms of Section 12(a)(g) of the Competition Act, described earlier in the analysis of material influence deriving from the acquisition of less than sole control. The only difference that the proposed merger makes is the establishment of *de jure* control. This, it was argued, meant that from a competition perspective the proposed merger will have a minimal impact on JMH's conduct and therefore the competitive status remained unchanged post-merger.[47]

In forming a view on *de facto* control the Tribunal assessed both the initial acquisition of the 25% shareholding in 1997 and the increase to 49.4% shareholding in 2005 by Life Healthcare's predecessor, Afrox.[48] In reviewing the shareholders' agreement, the Tribunal found that based on the initial acquisition of 25%, Life Healthcare was able to appoint 25% of the directors to the JMH board together with being able to exercise veto rights over a number of key operation decisions. It did not provide Life Healthcare with control at the board level of JMH or the ability to exercise the majority of votes at an annual general meeting. When Life Healthcare increased its shareholding in JMH to 49.4%, there was no change in the original shareholders' agreement or the form of control. Life Healthcare only appointed another director to the JMH Board immediately prior to the proposed acquisition of 70%. In total Life Healthcare appointed three directors to the JMH board of eight.[49]

Life Healthcare argued that it controlled all the major decisions at JMH pre-merger. For example, in the setting of board meeting agenda items Life Healthcare's views always prevailed. In addition, the board minutes which were discovered revealed that despite some

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[43] Case number: 15/LM/Jun11 at para. 36.
[44] Case number: 15/LM/Jun11 at para. 36.
[45] Case number: 15/LM/Jun11 at para.s. 175 to 177 and para.s. 204 to 215.
[46] Case number: 15/LM/Jun11 at para. 9.
[47] Case number: 74/LM/Sep11 at para. 21.
[48] Presmed initially acquired the 25% interest in JMH. After a restructuring Presmed became Afrox and then after further restructuring followed Life Healthcare.
[49] Case number: 74/LM/Sep11 at para. 24.

differences of opinion between Life Healthcare and the doctor shareholders, Life Healthcare's views always prevailed.[50]

Life Healthcare's arguments on *de facto* control were in contrast to the positions that it had previously taken in the notification of the acquisition of Amalgamated Hospitals Limited ("Amahosp")[51] and the 49.4% interest in JMH:

> The Amahosp merger notification involved the acquisition by Life Healthcare (at the time Afrox Healthcare Limited) of Amalgamated Hospitals, which owned four hospitals in Kwazulu-Natal in July 2001. In the merger filing, it was stated that JMH is a competitor and JMH was not listed as a firm that Life Healthcare controlled. Furthermore, in unconditionally approving the proposed acquisition the Tribunal noted that "in addition to competition from other big players such as Netcare, Joint Medical Holdings and Medi-clinic the structure of this market makes it unlikely that the merging parties may acquire market power."[52]
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> In 2003, the Commission was requested to provide an advisory opinion on whether the acquisition of a 49% interest by Life Healthcare in JMH required a merger notification, that is, did it result in a change in control of JMH. The legal view presented on behalf of Life Healthcare was that it would not be able to control JMH at the board or general meeting level. There was no mention made of Life Healthcare already holding *de facto* control in JMH and the acquisition of the initial 25% shareholding by Life Healthcare's predecessor, Presmed.[53] The Commission requested that the merger be notified on the basis that the acquisition of the 49% interest could lead to *de facto* control of JMH. Life Healthcare then sought another legal view, which argued that based on the initial 25% acquisition in JMH, Life Healthcare exercised joint and not sole control over JMH. This was based on the JMH shareholders' agreement which would continue to regulate the relationship between the various shareholders of JMH post the acquisition of the 49% interest by Life Healthcare. Therefore, it was the subsequent legal view that there would be no change in the quality of control for Life Healthcare in increasing its interest in JHM from 25% to 49%. The Commission was then persuaded that this legal view was correct and therefore advised the merging parties that notification was not necessary. Here again, no mention was made of Life Healthcare exercising *de facto* control of JMH.[54]

The Tribunal in evaluating whether Life Healthcare held *de facto* control in JMH assessed each of the views presented above, namely, the Amahosp merger filing, the subsequent legal view in the advisory opinion and the presentation made by Life Healthcare during the Tribunal proceedings for the proposed acquisition of the 70% interest in JHM. In terms of control scenarios there was a choice between no control (Amahosp merger filing), an attenuated form of joint control (subsequent legal view in the request for an advisory opinion) and unchanging sole *de facto* control as presented in the Tribunal proceedings for the proposed acquisition of the 70% interest in JHM.

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[50] Case number: 74/LM/Sep11 at para. 28.
[51] Case number: 53/LM/Sep01.
[52] Case number: 53/LM/Sep01 at para. 20.
[53] Case number: 74/LM/Sep11 at para. 32.
[54] Case number: 74/LM/Sep11 at para. 33 to 34.

The Tribunal found that Life Healthcare did have *de facto* control and a form of sole control of JMH since 1997 when the 25% interest was acquired by Presmed. This was based on the submissions of Life Healthcare presented in the Tribunal proceedings for the proposed acquisition of the 70% interest in JMH. Important considerations were the review of board minutes of JMH and an assessment of whether the doctor shareholders were ever able to constrain Life Healthcare's control.[55] In this regard, the Tribunal found

> "*Whilst legally the doctor shareholders or their nominated directors, acting jointly, may have been able to constrain that control, we have no evidence that they ever did so, certainly in any manner that might be competitively significant. The merger therefore serves to bring the de jure situation in line with the de facto situation, as Life will now control a majority of the votes at board level and at general meetings*."[56]

The Commission had recommended that the proposed acquisition be prohibited primarily on the basis that unilateral price increases were likely at JMH post-merger.[57] The Tribunal approved the proposed acquisition unconditionally on the primary reasoning that there was a change in *de jure* control and not *de facto* control and that price increases were unlikely due to Life Healthcare continuing to negotiate on behalf of JMH post-merger.[58]

The approach taken here with regard to establishing whether *de facto* control did indeed exist pre-merger is consistent with that recommended in the EC's guidelines. More specifically, the EC notes that a minority shareholder may be deemed to have sole control on a *de facto* basis.

> This is particularly in the case "*where, on the basis of its shareholding, the historic voting pattern at the shareholders' meeting and the position of other shareholders, a minority shareholder is likely to have a stable majority of the votes at the shareholders' meeting*."[59]

II. In some instances a sole controller with a majority interest provides a better competitive outcome than under joint control

Both the Media24 / Natal Witness and the Life Healthcare / JMH decisions highlighted the Tribunal's view that a firm under sole control may be a more desirable competitive outcome than one in which there is joint control. The relevant aspects of these decisions are explored fully below.

a. Market dynamics should be assessed

This principle is strongly reflected in the Tribunal's decision against the possible divestiture of the Natal Witness printing business Africa Web.[60] Through the proposed merger with Natal Witness, Media24 was increasing its direct shareholding in Africa Web to 80% post-merger. Media24 held a 50% shareholding in Africa Web pre-merger. The remaining

[55] Case number: 74/LM/Sep11 at para. 45.
[56] Case number: 74/LM/Sep11 at para. 46.
[57] Case number: 74/LM/Sep11 at para.s. 63 and 64.
[58] Case number: 74/LM/Sep11 at para.s. 86 to 87, 106 and 121.
[59] Refer European Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (2008/C 95/01) at para. 59.
[60] Case number: 15/LM/Jun11 at para.s. 182 to 184 and 196.

shareholders were the Natal Witness with 30%, Mr. Haresh Ouderajh (the founder of Africa Web) with 15% and the Janette Trust with 5%.[61]

The primary concern expressed by the Commission stemming from owners and editors of small community newspapers in KwaZulu-Natal and the Northern Eastern Cape was foreclosure by the merging parties to coldset printing services offered by Africa Web post-merger.[62] This concern was also expressed by Caxton who was allowed to intervene in the Tribunal proceedings.

The Commission at the closing of the Tribunal proceedings, proposed a partial divestiture of Media24's interest in Africa Web together with some behavioural conditions in order to regulate the conduct of Media24 in terms of Africa Web post-merger. The Commission recommended that Media24's interest in the Africa Web may not exceed 50.1% and that the remaining shareholding must be held by independent[63] third parties.[64] The Commission's reasoning was that post-merger foreclosure by Media24 of small independent publishers would be more difficult when there are a significant number of outside shareholders.[65]

Caxton proposed that the Tribunal should consider a complete divestiture of Africa Web to a third party post-merger, to the extent that the Tribunal was considering imposing conditions on the proposed merger.[66] In reviewing the Commission's proposed condition, Caxton's expert economist noted that Media24 having 80% was more appropriate than 50.1%. This was based on Media24 bearing a greater cost should it foreclose the printing services of Africa Web in favour of Natal Witness publishing services. The same it was argued applied to investment decisions, where an 80% interest by an acquiring firm is more likely to result in further investment in a target firm than 50.1% interest post-merger. Therefore, prices were likely to be higher at Africa Web if Media24 held a 50.1% interest rather than an 80% interest post-merger.[67]

The Commission rejected the full divestiture proposed by Caxton. The Commission's view was that this would not be the most effective outcome as finding a potential buyer may not be certain and there would also be a risk of that buyer not being willing to make the necessary capital investment in Africa Web's printing operations. There was also a risk that the buyer's own publication may be prioritised instead of independent community newspapers. The merging parties also objected to Caxton's proposed condition on the basis that uncertainty in relation to a future contract with a major customer, Shoprite Checkers, could affect Africa Web's ability to remain as a commercially viable printer in the market.

The Tribunal decided that neither a post-merger partial divestiture of Africa Web (proposed by the Commission) nor a full divestiture (proposed by Caxton) was the appropriate remedy given the dynamics of this case. The Tribunal accepted the argument advanced by Caxton's economic expert that Media24 is likely to act its own interest with a shareholding in 50.1% rather than in the interest of small community newspapers post-merger. Furthermore, Media24 was likely to be greater incentivised to invest further in Africa Web's printing

[61] Case number: 15/LM/Jun11 at para. 24.
[62] Case number: 15/LM/Jun11 at para. 3.
[63] This refers to third parties independent of the three main print media groups namely, Media24, Caxton and the Independent News and Media.
[64] Case number: 15/LM/Jun11 at para. 167.
[65] Case number: 15/LM/Jun11 at para. 180.
[66] Case number: 15/LM/Jun11 at para. 168.
[67] Case number: 15/LM/Jun11 at para. 181.

capacity with a larger economic interest. There was also a risk a potential buyer of Media24's shares in Africa Web being unable to commit to its share of capital expenditure post-merger.[68]

In terms of a full divestiture of Africa Web, the Tribunal agreed with the Commission's concerns. The Tribunal found that

> "*In a forced divestiture scenario the possibility exists that a potential buyer of Africa Web may well be motivated by short-term gains with no interest or incentive to maintain or invest in the press and subsequently degrade the press. This would be an ineffective outcome and would not be in the best interest of the small independent community newspaper publishers requiring printing services*."[69]

In the Tribunal's view a commitment made by the merging parties to minimum capital investment in Africa Web over five year and new printing press for the Natal Witness outweighed uncertainty around whether an independent third party purchaser would commit to such investment in Africa Web to maintain its levels of printing output.[70] The Tribunal was unable to take a view on the Shoprite Checkers' reaction to the post-merger full divestiture of Africa Web as no evidence was presented from Shoprite Checkers. However, the Tribunal did note that available evidence suggested that Shoprite Checkers was able to negotiate lower printing prices from Africa Web based on Africa Web's national price reviews.[71]

As explained earlier, the proposed merger was conditionally approved by the Tribunal with a focus on regulating Media24's interest in Africa Web post-merger. These conditions covered printing capacity conditions for Media24 at Africa Web, access by small independent publishers to Africa Web's printing services that were reasonable in terms of pricing and supply conditions, and a restriction on Media24 such that it ensures separate governance of the community newspaper publishing and printing business in KwaZulu-Natal and the Northern Eastern Cape. The final condition related to the notification of any small mergers in KwaZulu-Natal and the Northern Eastern Cape.[72]

b. Customer perceptions are important

In the Life Healthcare / JMH decision, the Commission had recommended that the proposed merger be prohibited primarily on the basis that unilateral price increases were likely at JMH post-merger.[73] The Commission also raised various other concerns including price increases for non-insured patients, decreased competition for specialists in the relevant product and geographic markets, the tunnelling of patients away from JMH and the effect on regional medical schemes.[74]

The Tribunal found that a number of these theories were not merger specific and all of them were also unlikely to occur post-merger. In so doing, the Tribunal noted that it was unlikely that the pre- and post-merger scenarios would differ materially partly due to the limited size of the JMH hospitals post-merger. The Tribunal also noted that JMH was unlikely to

[68] Case number: 15/LM/Jun11 at para. 182 to 184.
[69] Case number: 15/LM/Jun11 at para. 193.
[70] Case number: 74/LM/Jun11 at para. 193 to 196.
[71] Case number: 74/LM/Jun11 at para. 192.
[72] Case number: 15/LM/Jun11 at para. 169.
[73] Case number: 74/LM/Sep11 at para.s. 63 and 64.
[74] Case number: 74/LM/Sep11 at para.s. 88 to 103.

constitute a competitive threat to Life Healthcare even if there was independent behaviour pre-merger due to Life Healthcare holding 50% of JMH and the fact that there was no other major individual shareholder pre-merger. Notwithstanding Life Healthcare being a joint controller of JMH pre-merger, the Tribunal held that third parties including customers in the form of funders or medical specialists searching for a potential hospital to practice in would likely view, "a group halfway in the Life's camp as being a Life entity."[75] Therefore the interaction between funders, medical specialists and JMH would proceed on this basis and it was likely that the competitive potential of JMH would be dampened as opposed to a truly independent hospital group.

In concluding on the Commission's various theories of harm the Tribunal noted the following which echoes some of the thinking outlined in the Media24 / Natal Witness decision:

> "*Prohibition of the merger on the other hand would be unlikely to lead to greater competition and would more likely lead to a stalemate since Life is not being divested of its 49% stake, which would remain Life's even if the merger were prohibited. Rather, prohibition would lead to a situation of paralysis; a de facto controller not having enough of a stake to provide the incentive to invest further in JMH in order to improve its service offering, and a collection of disparate minorities not having the economic interest or the degree of influence to provide a decisive independent force*."[76]

Comparative analysis on the move from joint control to sole control

The three decisions together with the underlying thinking presented above provide some useful insights into understanding the approach of the Competition Authorities in assessing the move from joint to sole control. A comparative analysis of these three cases is now presented below.

A more focused analysis on the restraining influence of the other shareholder/s in the target firm

There definitely appears to be a shift in focusing more on the restraining influence of the other shareholders in the target firm by the Tribunal. More specifically:

> In the Naspers / M-Net and Supersport decision, the Tribunal did not present any analysis of board minutes or a review of Johncom's role in the M-Net and Supersport board, particularly in instances of disagreement with Naspers. Based on the Tribunal's view that Naspers held managerial control of M-Net/Supersport pre-merger this analysis would have proved useful and may have supported the view that anticompetitive effects were unlikely post-merger.
>
> In contrast, in the Media24 / Natal Witness and the Life Healthcare / JMH decisions this issue received a thorough assessment with both the role of other shareholders and their independence from the acquiring firm being fully assessed.

[75] Case number: 74/LM/Sep11 at para. 105.
[76] Case number: 74/LM/Sep11 at para. 106.

A consistent approach in assessing de facto control finding support in shareholder agreements and voting records

There appears to be consistency in the assessment of *de facto* control based on the Tribunal decisions in the Media24 / Natal Witness and Life Healthcare / JMH matters. In both instances the Tribunal was faced with divergent views on control presented by the acquiring firm in previous merger notifications and in advisory requests to the Competition Authorities. Whilst the findings on *de facto* control differed the assessment of shareholder rights and voting records particularly in times of dispute appears to be consistent. In particular:

> A key distinction between these two decisions was the size and importance of the other shareholder/s in the target firm. A single shareholder that held management responsibility over the target firm (the Craib family in the Natal Witness) is clearly more likely to have a restraining influence on the acquiring firm than many smaller shareholders (the doctor shareholders in JMH) that rarely disputed the acquiring firm's decision-making. Therefore, it is likely that the decision by the Tribunal accounted for this major difference in terms of the conditional approval of the Media24 / Natal Witness matter.

In this regard, it is also interesting to note that the approach taken by the Competition Authorities with regard to establishing whether *de facto* control exists is consistent with that recommended in the EC's guidelines. The EC notes that a minority shareholder may be deemed to have sole control on a *de facto* basis, particularly, in the case

> "*Where the shareholder is highly likely to achieve a majority at the shareholders' meetings, given the level of its shareholding and the evidence resulting from the presence of shareholders in the shareholders' meetings in previous years. Based on the past voting pattern, the Commission will carry out a prospective analysis and take into account foreseeable changes of the shareholders' presence which might arise in future following the operation. The Commission will further analyse the position of other shareholders and assess their role. Criteria for such an assessment are in particular whether the remaining shares are widely dispersed, whether other important shareholders have structural, economic or family links with the large minority shareholder or whether other shareholders have a strategic or a purely financial interest in the target company; these criteria will be assessed on a case-by-case basis*."[77]

Thus, in line with the approach taken by the Competition Authorities, the EC clearly expresses that the restraining influence of the other shareholders and historical voting records should be taken into account in determining whether *de facto* sole control exists.

[77] Refer European Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (2008/C 95/01) at para. 59. In this regard the following cases are cited in the guidelines as support:
Case IV/M.025 — Arjomari / Wiggins Teape of 10 February 1990; Case IV/M.159 — Mediobanca / Generali of 19 December 1991; Case IV/M.343 — Société Générale de Belgique / Générale de Banque of 3 August 1993; Case IV/M.754 — Anglo American / Lonrho of 23 April 1997; Case IV/M.1519 — Renault / Nissan of 12 May 1999; Case COMP/M.2574 — Pirelli / Edizione / Olivetti / Telecom Italia of 20 September 2001; Case COMP/M.3330 — RTL / M6 of 12 March 2004; Case COMP/M.4336 — MAN / Scania of 20 December 2006.

A consistent approach in finding in favour of sole control on the basis of likely further investment in the target firm

In both the Media24 / Natal Witness and Life Healthcare / JMH matters the Tribunal was consistent in finding that sole control (albeit with some conditions in Media24 / Natal Witness) was a better competitive outcome than joint control on the basis that further investment was more likely. This would lead to pro-competitive gains for consumers.

> In the case of Media24 / Natal Witness, this was likely to occur due to Media24 increasing its incentives to further invest in Africa Web and concurrently being dis-incentivised from engaging in any form of foreclosure of Africa Web due to its relatively larger shareholding (80% compared to 50%). With respect to Life Healthcare / JMH the Tribunal found that Life Healthcare would be greater incentivised to further invest in JMH if it acquired sole control, free from numerous minority shareholders not acting decisively.

IMPLICATIONS FOR THE COMPETITIVE ASSESSMENT

The determination of control in the context of the move from joint to sole control has strong implications for the competitive assessment. From the perspective of the merging parties the strongest being that of arguing that due to *de facto* control pre-merger the proposed merger is unlikely to result in a substantial prevention of lessening of competition post-merger. The Commission on other hand may take the view that the case for *de facto* control may be weak and therefore argue that the proposed merger is likely to substantially prevent or lessen competition in the relevant markets post-merger.

From an economic perspective, the critical consideration is the impact on the merging parties' ability and incentives to engage in any form of anti-competitive conduct post-merger. It is the economic perspective that generally forms the basis of the approach taken by Competition Authorities.

Using the key principles to emerge from the analysis of the three leading cases provided earlier a list of key considerations for the competitive assessment is outlined below:

1. What are the relative shareholding and respective rights deriving from this shareholding in the acquiring and target firm's pre- and post-merger?

   This is critical in determining both the ability and incentives of the firms and their respective shareholders pre-merger and post-merger. In a joint control scenario, minority protections in the target firm for other shareholders are an important factor in determining any change in the ability or incentives of the merging parties post-merger.

   a. What is the constituency of the other shareholders in the target firm pre-merger?

      The nature of these shareholders in terms of their size and significance is vital in evaluating whether they can individually or as group have any influence over the management or operations of the target firm pre-merger.

2. Are the other shareholders in the target firm active in making and taking decisions pre-merger?

   Even if the other shareholders are significant in their size it is necessary to assess whether they have played a role decision-making at the target firm pre-merger. This is usually evident in both the planning and execution for board and management meetings pre-merger.

3. Do the other shareholders hold management control of the target firm pre-merger?

   This is an important element in evaluating the possibility of *de facto* control pre-merger. In a joint control scenario it may well be that the other shareholders have management control of the target firm and therefore it is possible there will be a change in both the ability and incentives of the merging parties post-merger.

4. Is further investment in the target firm necessary to ensure its long-term viability post-merger?

   The potential for further investment is more likely to occur under a sole control scenario post-merger, where the acquiring firm or shareholder/s have a greater incentive to ensure the profitability of the target firm's operations than would be the case under a scenario of joint control pre-merger. There are associated benefits for customers if further investments are made in any firm however, these will have to be assessed together with any potential anti-competitive effects post-merger. The prospect of remedies can also be assessed if it is likely that competition concerns, particularly the foreclosure of customers and competitors, are possible post-merger.

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Public Investment Corporation Limited and ADR International Airports South Africa (Pty) Ltd decision (Case number: 108/LM/Nov05)

Sun International Limited / Real Africa Holdings Limited decision (Case number: 41/LM/Apr06)

Appendix

The assessment of competitive effects

The assessment of control, much like the definition of relevant markets, is not made in isolation. It is made with the purpose of evaluating the possible competitive effects of the proposed merger. This is the key requirement in terms of Section 12A.(1) of the Competition Act.[78] In simple terms, mergers can give rise to unilateral effects and coordinated effects. A detailed examination of each type of competitive effect is provided below together with further insight in terms of the various forms of control described earlier.

Unilateral effects

Traditional approach

This refers to a scenario in which the competitive effects only emanate from the merged entity post-merger. Therefore this scenario is also termed 'non-coordinated effects'. As noted by the International Competition Network ("ICN"),

> "*Unilateral effects arise where, as a result of the merger, the merging firms are able to exercise market power, for example, by profitably raising price, or reducing output or quality or variety (or changing any other competitive parameter) as a result of the elimination of competition between the merging parties themselves*".[79]

The distinction between unilateral price and strategic effects

The scenario described above critically assumes that the merged entity must have operational control in terms of decision-making around pricing and output levels at both the acquiring and target firms post-merger. Based on the varying forms of control presented earlier we submit that unilateral effects can be further distinguished in terms of being price effects or strategic effects.

Unilateral price effects

Unilateral price effects specifically refer to the traditional approach described above and encompass the scenario of full operational control at both firms post-merger. These price effects can also arise when there is operational control in terms of key decision-making in either the acquiring or target firm post-merger.

In a classic article[80], O' Brien and Salop (2000) identified that competition could be reduced even where the merged entity has pricing control over only one of the two merging firms and a passive financial interest in the other. This would occur in cases where the merged entity instructed the controlled firm to increase prices above the optimal pre-merger level[81], knowing that revenues lost as a result of some customers migrating to competitors would to some extent be made up by revenues gained by the competitor firm which it does not

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[78] Section 12A.(1) of the Competition Act states that,

> " ***Whenever required to consider a merger, "the Competition Commission or Competition Tribunal must initially determine whether or not the merger is likely to substantially prevent or lessen competition***…"

[79] Refer to the ICN Merger Guidelines Workbook, April 2006, at para. C.4.

[80] Daniel O' Brien and Steven Salop. Competitive effects of partial ownership: Financial interest and corporate control. Antitrust Law Journal (2000) 67.

[81] At the market equilibrium prior to the merger such a price increase would be unprofitable due to customers switching to competitors. This follows from the definition of market equilibrium.

control, but in whose financial success it would henceforth have a stake. However, for this effect to be significant, the following two conditions must hold:

(1) A significant portion of customers switching away from the firm increasing prices must be expected to divert to the firm in which the merged entity has a non-controlling stake; and

(2) The merged entity must have a sufficiently high stake in the non-controlled firm such that this increase would yield a significant benefit from the diverted customers.

Unilateral strategic effects
In cases where the merged entity does not have operational control over either of the merging firms, unilateral price effects are unlikely to apply. However, a minority shareholder with no operational control may still exercise negative control if it has veto rights over certain key strategic commercial decisions of the firm. It is this exercise of negative control that gives rise to unilateral strategic effects. In such cases, the competitive assessment will focus on whether post-merger the negative control could be used in a manner that results in a substantial lessening of competition. It is important to note that whether or not veto rights give rise to negative control depends on the content of the decisions that may be blocked. So veto rights over decisions that influence competition in the relevant market for example, pricing, new product development or market expansion are relevant in determining negative control.

Coordinated effects
This refers to a scenario in which the competitive effects emanate from the merged entity and its competitors in the relevant market/s post-merger. According to the ICN,

> "*Coordinated effects may arise where a merger reduces competitive constraints in a market, thus creating or strengthening the conditions that facilitate the ability of competitors to coordinate their competitive behaviour*."[82]

The key consideration is therefore whether a proposed merger significantly increases the likelihood that firms will coordinate their behaviour or strengthen existing coordination. This scenario specifically applies when the merged entity has no control (positive or negative) in either of the acquiring firm or the target firm. It is still relevant to determine whether two such passive shareholdings may give rise to merger-specific coordinated effects.

[82] Refer to the ICN Merger Guidelines Workbook, April 2006, at para. D.4.