COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: 23/LM/Feb07

In the matter between:

NASPERS LTD Acquiring Firm

And

ELECTRONIC MEDIA NETWORK LTD First Primary TargetFirm

SUPERSPORT INTERNATIONAL HOLDINGS LTD Second Primary TargetFirm

And

CAXTON CTP PUBLISHERS AND PRINTERS LTD Intervening Party

Panel : D Lewis (Presiding Member); Y Carrim (Tribunal Member) and N Manoim (Tribunal Member)

Heard on : 08-12 October 2007 and 08 November 2007

Order Issued : 08 October 2007

Reasons Issued : 24 January 2008

Reasons for Decision

Order

[1] On 8 October 2007 the Tribunal unconditionally approved the transaction whereby Naspers Limited ("Naspers") acquired sole control of Electronic Media Network Limited ("M-Net") and SuperSport International Holdings Limited ("SuperSport"). The reasons for this decision follow.

The parties

[2] The primary acquiring firm is Naspers Limited ("Naspers"), a public company listed on the JSE Securities Exchange Limited. The parties submitted that Naspers Beleggings Limited and Keeromstraat 30 Beleggings Limited are the firms that

directly or indirectly control Naspers.[1]

[3] The primary target firms are Media Network Limited ("M-Net") and SuperSport International Holdings Limited ("SuperSport"). M-Net was launched in 1986 as the first subscription television service in South Africa. M-Net currently has an array of general entertainment and niche channels and broadcasts to more than 1.3 million viewers in more than 40 countries across the African continent and its adjacent islands. 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. M-Net is jointly controlled by Naspers and Johnnic Communications Limited ("Johncom"). M-Net controls Oracle Airtime Sales (Pty) Ltd ("Oracle"). SuperSport is also jointly controlled by Naspers and Johncom.

[4] In terms of the proposed transaction Naspers will acquire sole control of M-Net and SuperSport. The majority direct shareholder of M-Net/SuperSport is a holding company called MNH Holdings (1998) (Pty) Ltd ("MNH"). This holding company's shareholding in SuperSport is currently 52.6%. MNH is currently owned 50% by Naspers, 47.5% by Johncom and 2.5% by Natal Witness Investments (Pty) Ltd ("the Natal Witness"). The current direct shareholding in M-Net/SuperSport is as follows: MNH 52.66%; Naspers 23.33%; Johncom 13.56% and MultiChoice Africa (Pty) Ltd ("MultiChoice") 10.45%. The direct and indirect interests in M-Net/SuperSport are accordingly as follows: Naspers 60.12%; Johncom 38.56 and Natal Witness 1.32%.[2] Naspers, Johncom and the Natal Witness are parties to a shareholders' agreement in respect of MNH ("the MNH Shareholders' agreement"), which also regulates their relationship in respect of M-Net/SuperSport. 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.[3]

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1 According to the Commission's Report, page 4, Naspers controls the following firms either directly or indirectly: Paarl Media Holdings (Pty)Ltd; Touchline Media (Pty)Ltd; Boland Koerant (Pty)Ltd; via Afrika Limited; Educor holdings Limited; MIH Investment (Pty)Ltd; MIH Holdings; Multichoice Africa (Pty)Ltd; M-Web Holdings (Pty)Ltd; MNH Holdings 1998 (Pty)Ltd; Electronic Media Networks Limited; SuperSport International Holdings Limited; Multichoice Supplies (Pty)Ltd and Media 24.

2 See the Competitiveness Report page 263 of the record.

3 For a post merger shareholding structure of M-Net and SuperSport please see page 6 of the Commission's report.

Therefore the proposed transaction entails the acquisition by Naspers of all Johncom's direct and indirect interests in M-Net/SuperSport.

[5] Naspers is a multinational media company which has interests in various formats of media including pay television, internet, newspapers and magazines. Naspers, through its subsidiary, Media24 Ltd ("Media24"), is the largest publisher of newspapers and magazines in South Africa.[4] MultiChoice is a wholly owned subsidiary of Naspers and it provides subscription television (in the form of bouquets) and subscription management services. MultiChoice describes itself as providing television and subscriber management services inter alia in South Africa. It offers the DStv bouquet of channels (including M-Net and SuperSport) via satellite. MultiChoice is currently the only subscription based provider of satellite television services in South Africa. Johncom controls major interests in print media (newspapers and magazines), music, retail, home entertainment, books and maps. Naspers and Johncom, through their respective interests and shareholding arrangements jointly control M-Net and SuperSport.

Rationale for the transaction

[6] The parties have submitted that the rationale for the transaction is the need to improve the empowerment shareholding in M-Net/SuperSport which decreased as a result of the unbundling of Johncom from Johnnic Holdings Limited, and a desire to simplify the corporate structure.

Background to hearings

[7] During its investigations of the proposed transaction the Competition Commission ("the Commission") received objections from print media companies alleging that Naspers would, post- merger, behave in a manner which is likely to substantially prevent or lessen competition in the market for advertising in print media. The print media companies were Caxton and CTP Publishers and Printers Ltd ("Caxton") and Independent News and Media (South Africa) (Pty) Ltd ("Independent Group").

[8] Caxton's submissions to the Commission are contained in a letter received from its attorneys dated 30 March 2007.[5] In this letter Caxton submitted that the merger would enable Naspers to leverage its dominant position in pay TV in support

4 Naspers controls four national Sunday newspapers and a significant number of regional and community newspapers. Naspers is also the largest publisher of paid consumer magazines, which it distributes nationally through its wholly owned subsidiaries.
5 See pages 702-706 of the Commission's record.

of its print media interests by engaging in the practices of cross subsidisation, foreclosure and bundling. This would ultimately retard the ability of Naspers' competitors in the print media market to act as an effective competitive constraint and, so, portend a substantial lessening of competition in the print media market.

[9] Substantially similar allegations are made by the Independent Group, another large print media interest, in a letter dated 2nd April 2007. [6]

[10] The Commission considered these submissions but ultimately recommended that the merger be unconditionally approved.

[11] On the 2nd July 2007, Caxton brought an application before this tribunal for leave to intervene and participate in the merger proceedings in terms of section 53(1) (c) (v) of the Competition Act 89 of 1998 ('the Act') read with rule 46 of the Competition Tribunal Rules. We were notified by the Independent Group that it did not intend to participate further in the merger proceedings. While the application to intervene was not opposed by the merging parties, they did contest the scope of intervention requested by Caxton. The intervention application was accordingly set down for hearing.

[12] Caxton is a publisher and printer of books, magazines, newspapers and commercial print in South Africa. It controls one regional daily newspaper and many regional and community newspapers. Caxton also publishes a number of magazines which are distributed nationally and it also has its own distribution division.[7]

[13] The merging parties did not oppose the application brought by Caxton. However they argued that the applicant's scope of intervention should be limited by permitting it to raise only issues relating to vertical foreclosure and mixed bundling. The merging parties argued that the applicant should not be permitted to raise cross-subsidisation as an additional competition issue.

6 See pages 710-715 of the Commission's record

7 See paragraph 15 of the founding affidavit of Terrence Desmond Moolman in the intervention application.

[14] After hearing the intervention application the Tribunal granted Caxton intervention rights insofar as its allegations of bundling and foreclosure were concerned, but declined to permit it to include the allegation relating to cross subsidisation in the scope of its intervention.

[15] On 7 August 2007 Caxton launched an urgent review application before the Competition Appeal Court ("CAC"). Caxton argued that the Tribunal had committed a reviewable irregularity by placing limits on the scope and ambit of intervention. The review application was heard on 10 September 2007 and on 4 October 2007 the CAC dismissed Caxton's application on the basis that Caxton failed to show that the Tribunal, in making the aforesaid order, acted *ultra vires*, exceeded its jurisdiction or that it improperly exercised its discretion.[8]

COMPETITION ANALYSIS

Introduction

[16] This transaction involves the acquisition by Naspers of sole control of M-Net and SuperSport. As elaborated above, while, pre-merger, the target firms, M-Net and SuperSport, were managed by Naspers, control of the companies was shared between Naspers and Johncom. The transaction effects a change from joint control by Naspers and Johncom to sole control by Naspers. At the risk of stating the obvious, in examining the impact of this merger on competition our task is to establish whether any likely change in competitive conditions, in particular a likely substantial lessening of competition, is attributable to the removal of Johncom from the joint control structure. That is, the predicted change in the competitive landscape must be merger specific; it must be shown to have emanated from the transaction.

[17] From the perspective of pay TV, or, indeed, TV generally, there are no horizontal competition issues at stake in this transaction. The acquiring firm, Naspers, is, as already stated, simply increasing its stake in the two target companies, M-Net and SuperSport, and, in the process, moving from a position of shared control to sole control. There are no additional pay TV assets or any other media assets that are being acquired. Indeed to the extent that there are any

8 See paragraph 33 of Case No 72/CAC/Aug 2007.

horizontal issues implicated in this merger at all, these would ordinarily be grounds for celebration in the ranks of those charged with promoting competition. This is because both Naspers and Johncom do separately own a powerful stable of competing assets in the magazines and newspaper segments of the broad media market. Moreover, Johncom holds a significant stake in Caxton, another powerful participant in printing and in the publication of newspapers and magazines. In other words this transaction effects the structural separation of Naspers from two of its most significant competitors in print media, namely Johncom and Caxton. Nor does the transaction give rise to any vertical integration.[9] However, far from celebrate, we are asked to prohibit the transaction.

[18] The reason why this apparently counter-intuitive response is urged upon us arises precisely from the potential combination of, on the one hand, Naspers' print media assets and, on the other, the <u>unrestrained</u> control of the pay TV assets, M-Net and SuperSport, that it will acquire in consequence of the transaction. It is argued that whereas in the pre-merger joint control structure Johncom's presence will have restrained Naspers from deploying the TV assets to support its print media assets, post-merger Naspers will be at large to deploy its powerful and newly unrestrained position in pay TV to bolster its already powerful competitive position in the print media market and, particularly, in the magazine market.[10]

[19] Why would Johncom have restrained Naspers in this way? The only inference that can be drawn from this apprehension, is that an unrestrained Naspers will be prepared, temporarily at least, to compromise profit maximizing behaviour in its management of its pay TV assets (in which Johncom has a substantial economic interest) in order to bolster its print division (in which Johncom has no interest whatsoever except qua competitor). An unrestrained Naspers would, the argument must logically assume, do this, would be prepared to sacrifice profit maximization in pay TV, in the interests of the greater Naspers group. On the other hand, Johncom,

9 Caxton has alleged a vertical relationship insofar as M—Net and SuperSport provides an input, the advertising of magazines, to Caxton. Caxton then alleges the likelihood of foreclosure. This foreclosure claim is briefly examined below.

10 '*Johncom, through its joint control of M-Net and SuperSport currently acts as a restraining influence and prevents the group from leveraging the market power that M-Net and SuperSport currently enjoy. If the merger is approved this restraint will self-evidently disappear, and Naspers will have the ability to bundle advertising on pay-television and in magazines'.* Caxton HOA paragraph 7.3.

as a rational profit maximiser and with no interest in the fortunes of the Naspers group beyond their shared interest in M-Net and SuperSport, would not support the deployment of its TV assets in this way and so, it is argued, its removal from the control structure in consequence of the transaction enhances the strategic possibilities available to an unfettered Naspers. These new strategic possibilities, it is further contended, are likely to be deployed to undermine the competitive structure of the magazine market and would ultimately give rise to anti-competitive outcomes in that market.

[20] The Commission's report reveals that it has been alive to these concerns. However, as noted above, it does not envisage that they give rise to the likelihood of a substantial lessening of competition. It concludes that post-merger Naspers has neither the incentive nor the ability to utilize its pay TV assets in a manner that will compromise the competitive structure of, or competitive outcomes in, the magazine market. Caxton, a significant player in the magazine market, thinks differently. It apprehends that the merger will sorely affect its magazine interests, to the extent of possibly driving it from the market, and so it has intervened in the determination of this matter.

[21] There are, as we have said, no horizontal issues at stake in this transaction. A rather lame attempt has been made to construct some semblance of a vertical issue but, although we deal with this briefly, we think that it has so little merit that even Caxton, who is responsible for placing this issue before us, does not seem to have persisted with it. We are then left with the potential 'portfolio effects', with the prospect that a firm – Naspers – involved in multiple media markets, will deploy its assets in one of those markets, the pay TV market, to advance its position in a second market, that for the publication of magazines. It is common cause that these – pay TV and print media – constitute separate markets although both sell advertising frequently to the same advertisers.[11]

11 'Within the context of economic analysis, it is helpful to examine the problem as a manifestation of portfolio power. Portfolio power arises in those mergers where customers typically purchase a range of affected products. Against the backdrop of the requirement of *diversity of voice, we say that here the 'affected product' is advertising slots in different markets (such as print media and TV, suitably segmentalised'.* (Caxton HOA paragraphs 7 and 7.1)

[22] As already noted, Caxton was permitted to intervene in respect of its allegation that Naspers will utilise its post-merger position in pay TV to engage in the practices of foreclosure and bundling in order to bolster its position in the print media market. We will confine ourselves to an examination of these theories of harm. With respect to foreclosure, it is alleged that M-Net/SuperSport will refuse to make available advertising slots for magazines to Caxton and, presumably, to other print media groups that are in competition with Naspers. With respect to bundling and, particularly, mixed bundling, Caxton alleges that M-Net/SuperSport and Media24, the Naspers print media division, will make available bundles comprising TV advertising slots and advertising space in their magazines to prospective advertisers. We will focus on these allegations and particularly that of mixed bundling which was the only anti-competitive prospect seriously pursued by the intervener and in other submissions made to the Commission.[12]

Relevant Markets

[23] Media markets are appropriately characterized as two-sided markets. That is to say there are, on the one hand, markets for the sale of the media products, for sales of magazines and newspapers and for the sale of viewership subscriptions for pay TV. For those whose television viewing is confined to the free-to-air (FTA) channels there is the payment of a license fee. Those consumers who choose to purchase a pay TV subscription are effectively obliged to pay a public TV license and, hence, to 'purchase' access to FTA TV. That is to say, while all of those who have access to FTA do not necessarily have access to pay TV because of the additional subscription and dedicated equipment that is required, those who have access to pay TV necessarily have access to FTA TV.

[24] Then there are the markets for the sale of advertising space on these varying

12 A third possible source of anti-competitive harm alleged by Caxton in its intervention application is the enhanced prospect of Naspers cross-subsidising its print media activities by utilizing the massive revenues generated in M-Net/SuperSport. The panel's decision in the intervention application denied Caxton's request to pursue their allegations of possible cross-subsidisation of Naspers' print media activities by the revenues that accrue to it through its interests in pay TV. We do not need to decide the role – if any – that the enhanced opportunity for cross-subsidisation should play in merger analysis. Suffice to say that Naspers has, even in the absence of the merger, ample opportunity to utilize its pay TV revenues for cross-subsidising the activities of other divisions in the group. The prospects of cross-subsidisation are, in other words, not merger-specific.

media. There is an interface between the two sides of the market to the extent that the volume, price and content of advertising are powerfully influenced by the number and the demographic character of viewers and readers of the various media.

[25] There are two broad media markets implicated in this transaction. These are the print media markets which comprise magazines and newspapers. And there is the television market which is populated by FTA channels and pay channels. The acquiring firm – Naspers – is active in both broad markets. It owns a significant stable of magazine and newspaper titles. And it shares control, with Johncom, of M-Net and SuperSport and also of Oracle, the company which sells advertising slots on M-Net and SuperSport as well as on certain of the other channels that are part of the Dstv pay satellite bouquet provided by Multichoice. The transaction will, as already noted, result in Naspers acquiring sole control over M-Net and SuperSport.

[26] The intervener, Caxton, is active in the print media markets. It owns significant printing capacity as well as a wide array of magazine and newspaper titles. It contends that Naspers will leverage its newly unrestrained control of the pay TV businesses of M-Net and SuperSport in support of its already powerful position in the print media markets, and, particularly, in the magazine segments of the print media market.

[27] It is common cause that the competition harm alleged to arise from this transaction directly concerns the market for the sale of advertising on TV and the market for the sale of advertising in the magazine segment of the print media market.

The television market

[28] Pay TV refers to subscription based television services. Currently there are two pay TV platforms in South Africa (the M-Net terrestrial platform and the Multichoice digital satellite platform). Pay TV in South Africa started in 1986 with the

launch of a single terrestrial pay TV channel (M-Net).[13] In 1995 a multi-channel satellite subscription service, Dstv, was launched consisting of fourteen channels, with M-Net and SuperSport as its primary content providers.

[29] MultiChoice offers premium digital bouquets consisting of some 74 video channels, 65 audio channels and 8 data channels, as well as premium analogue terrestrial services consisting of sport and movies. M-Net produces 15 entertainment channels for broadcast across the African continent. M-Net has output deals with all the major film and television studios, enabling it to screen quality movies, series and miniseries. *SuperSport* produces nine sports channels for the *DSTV* platform.[14]

[30] There are currently two FTA operators in South Africa. These are the state controlled South African Broadcasting Corporation ("SABC") which broadcasts on three domestic channels namely SABC1, SABC2 and SABC3. The SABC also broadcasts SABCAfrica, a news and entertainment channel, to the rest of the continent. The second FTA operator is e-TV which was launched in 1998. The station carries a mix of news, sports and entertainment.[15]

[31] Caxton contends for separate markets for the sale of advertising on pay TV, on the one hand, and FTA TV, on the other.[16] While it is not always easy to discern the basis for Caxton's arguments, it is fair to say that an extremely limited factual basis is established in support of Caxton's contention that there are two markets for the sale of advertising on TV. While we will not make a definitive finding on the relevant market for advertising on TV, there are strong *prima facie* grounds for suspecting that the market definition is significantly more complex than that contended for by Caxton.

[32] Hence we note the contention – one that appears to be common cause – that

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13 When M-Net was launched it jointly owned by four media houses namely: Argus Holdings Limited (now Johncom), the South African Associated Newspapers Limited ("SAAN"), Nasionale Pers Beperk (Naspers) and Die Pers Korporasie van Suid Afrika Beperk ("Perscor"). This was done in order to compensate the commercial media houses for the decision to permit the SABC to compete for advertising. It appears that Caxton, though desirous of participating in the ownership of the M-Net, was denied this opportunity.

14 See the Naspers website at http://www.naspers.co.za/English/mih.asp#paytvsa, last visited on 29 November 2007

15 See http://www.southafrica.info/ess_info/sa_glance/media/satv.htm, last visited on 29 November 2007

16 See paragraph 41 of the Oxera Expert Report on page 194 of the witness statements file bundle.

advertising flighted on pay TV, is directed at high income groups, who constitute the large bulk of consumers of pay TV. It is a contention that appears to be supported by the evidence presented to us. However in deciding the relevant market – and, in particular in deciding whether the sale of advertising on pay TV and FTA belong in separate markets or in the same market – we would have to consider whether it is appropriate to treat FTA TV as homogenous from, inter alia, the perspective of the income levels of those who view the respective FTA channels which, as we have noted, is considered to be the defining characteristic of pay TV viewers. But this is clearly not the case. At the most general level, language, for example, distinguishes the three SABC FTA channels as well as the e-TV channel from each other and language coincides to a significant extent with income levels.[17]

[33] Thus while a more rigorous analysis of the relevant markets may well conclude that SABC1 and pay TV belong in separate relevant markets, it may equally conclude that SABC3 and pay TV occupy the same market. By the same token, the market will also clearly be impacted upon by the programming content on the respective channels. Hence the evidence shows that the Afrikaans news programme on SABC2 is a particularly highly sought after slot for advertising directed at high income viewers. A rigorous examination of the markets may then conclude that while the sale of advertising on selective programmes flighted on SABC2 belong in the same relevant market as that occupied by pay TV and SABC3, this does not apply to all advertising slots on SABC2. Again we may find that while the same advertisers contend for slots during significant sports events on the pay TV channels and on whatever FTA channel (the three SABC channels and e-TV) these significant sporting events are flighted, this may not reflect advertising demand for, say, an evening movie channel on pay TV and a late afternoon soap opera programme slot on SABC1. Note the following extract from the evidence of Mr. Peter McKenzie, the CEO of Oracle:

> Adv Wallis: *Right. Now what are the factors that go into the determination of your rates in negotiating advertising rates:*

Mr. McKenzie: *Yeah, it is quite a long list, but without doubt top of that list is our*

17 While the evidence does indeed confirm that the audience of the pay-TV channels falls predominantly into the LSM8-10 consumer categories, the FTA channels have a greater volume of LSM9-10 viewers than does pay-TV. Also it appears that DSTV subscribers spend 40% of their viewing time watching FTA TV. Merging Parties HOA Para 58

competitors and our competitors in the first instance are SABC3 because they compete most directly with our audiences. SABC2, particularly timeslots, particular types of programming, particularly their Afrikaans language programming, e-TV, but even on a channel like SABC1, the window that they have created for their early evening soaps, Bold & The Beautiful, Days of our Lives, very much create… competes with the Pay Television audiences and in fact a lot of our subscribers I'm sad to say are seemingly quite addicted to it and visit those programmes on a daily basis. So we have to be very mindful first and foremost of the television competition. Then there a multitude of other factors. It is seasonal.

> *A lot of our advertising, whilst the number, the cost of the spot, the efficiency of the spot, the cost per point that we talked about yesterday are very important, a lot of it is event driven and that is particularly so in the case of sports. So a high profile sport event where you have got very limited inventory, I mean you can't stop Sunday night's Rugby semi-final to drop a commercial in when you want. Yeah, that is going to mean that the price of that spot is going to be greater.*[18]

[34] These issues pose major questions regarding the boundaries of the relevant market. While the merging parties have at least addressed these complexities in the testimony cited above, they still seem to contend for a single market for TV advertising. Caxton, for its part, has made no attempt to confront these complexities and so, all evidence to the contrary notwithstanding, it still insists on wholly separate FTA and pay TV advertising markets.[19] While we cannot, on the evidence submitted to us, definitively identify the boundaries of the relevant market, it is clear to us that both the merging parties' contention for a single market for advertising on pay TV and FTA as well as Caxton's insistence that the sale of advertising on pay TV and the sale of advertising on FTA TV belong in separate relevant markets, are likely to be significant over-generalisations that are not based on a rigorous analysis of the facts.

[35] Caxton's argument for separate markets seems to rely wholly on the contention that advertising on pay TV and FTA TV are complementary products and

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18 Transcript pp541-2

19 Although even Caxton's conclusions are not expressed very confidently. The report of Caxton's economic expert concludes '*the evidence on there being separate markets for advertising on pay TV and free-to-air TV, when considering high LSM customers, is mixed'.* Cited on p738 of the transcript in the merging parties closing argument.

not substitutes. As Mr. Neil Marshall, the Caxton expert witness argues:

> "Significantly, evidence on the purchasing patterns of advertisers indicates that they have a positive correlation of valuations for advertising on M-Net and SABC, which means that they will either purchase both or neither."[20]

[36] This view is then supplemented by the apparently unsupported, and contradictory, assertion that advertising on pay TV is a 'must have', that is, that a product directed at high income consumers and that relies on TV and print advertising, 'must' purchase slots on pay TV if it is to successfully market its product. We cannot identify the evidential basis for this assertion, which appears to be undermined by Marshall's insistence that advertisers will purchase 'both or neither'. The evidence does reveal that many of the advertisers that utilise slots on (selected) FTA channels and programmes do indeed also purchase advertising time on pay TV (just, indeed, as do these advertisers also appear to purchase advertising space on the full array of competing magazine offerings).

[37] However, on the basis of this evidence it is not clear why pay TV is more appropriately bestowed with a 'must have' status than are selected FTA channels and programmes, or, for that matter, than are the various magazines in which they all appear to advertise. All that is clear is that if demand for the two products is complementary – we heard much about gin and tonic in the hearings – then neither can acquire a 'must have' status that does not belong equally to its complement. This is, by and large, what the evidence suggests although Mr. McKenzie testified that there are many more instances of advertisers utilising only FTA TV (to the exclusion of pay TV) than the converse.[21]

[38] We are, in any event, not at all certain that this observation suggests that the products are complementary or that they necessarily belong in separate markets. It may suggest no more than that a significant portion of the considerable cost of

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20 See paragraph 95 of the joint witness statement of Helen Jenkins and Neil Marshall on page 214 of the bundle of witness statements file.

21 See McKenzie's testimony Transcript pp556-9.

running an advertising campaign on television is in the production of the advertising material itself and it makes basic commercial sense to then 'sweat' the costly product to the fullest extent possible, to achieve, in other words, maximum coverage of the material produced. Nor are we convinced that, despite the amount of hearing time devoted to this issue, that anything of significance turns on it.

[39] Certainly it does not suggest – as does demand complementarity – that the one product (advertising on pay TV) cannot be consumed, and so will not be purchased, without the purchase and consumption of its claimed complement (advertising on FTA TV). Indeed we have been presented with no reason or evidence for believing that were the cost of advertising on pay TV to be increased by a significant amount that advertisers would not move more of their TV advertising spend to those segments of FTA TV whose viewership matched the demographic segment that watch pay TV. Given that there is no evidence suggesting collusion between pay TV and FTA TV, it is reasonable to interpret the proximity of the pay TV and SABC3 advertising rates as evidence that they are substitutes for one another, that is, that they belong in the same market.

[40] The identification of the relevant market for the sale of advertising on TV does have bearing on the adjudication of this merger. If there is a separate market for the sale of advertising on pay TV – that is, if an increase in the relative price of advertising on pay TV did not cause customers to substitute this for advertising on FTA TV – then we may justifiably conclude that M-Net/SuperSport is clearly dominant in its market and, this, as we shall outline below, may have implications for the attractiveness of a pay TV/magazine bundle, the more so if the contention that advertising on pay TV is a necessity, a 'must have', for advertising directed at high income consumers were to be accepted.

[41] However, the evidence seems to suggest that both pay TV and FTA TV enjoy pricing power in relation to advertisers at certain times and on certain programmes. This is likely to derive, to some extent, from the relative scarcity of these slots, a scarcity that is heavily influenced by the regulatory regime that lays down the maximum time that may be devoted to advertising. We note that pay TV appears to

be allotted fewer advertising minutes than is FTA TV.[22] But, as mentioned above, the tendency to advertise on both pay and FTA TV also probably derives from the necessity to amortise the significant costs sunk in the production of TV material over as many eyes as possible.

[42] We should emphasise that evidence of pricing behaviour indicates a close correlation between the prices charged to advertisers by pay TV and SABC3. This appears to bear out our suggestion that the FTA market is segmented and should not be viewed as a homogenous entity. It also appears to indicate keen competition for advertisers between those television platforms (such as pay TV and SABC3) with a predominantly high income viewership.

[43] In short, on the evidence presented we are unable to arrive at a firm decision on the relevant market. Although we are inclined to believe that there is a degree of substitutability between advertising on pay TV and advertising on the high income segments of FTA, the evidence presented does not permit us to make a definitive finding on the relevant market but does rather suggest that, at least as long as their prices are broadly comparable, advertisers will utilise both platforms. However, as outlined below, when we proceed to examine the likely competition implications of this transaction we will assume that Caxton's contention that there is a separate relevant market for pay TV in which the merging parties are dominant is correct and we will show that, even under this highly favourable assumption, a persuasive case for apprehending the likelihood of a significant lessening of competition post-merger is not made out.

The magazine market

[44] Print media comprises newspaper publication as well as magazine publication. This merger – and the market in which Caxton fears a likely substantial lessening of competition – is concerned with the magazine segment of the market.[23]

22 See Mr. McKenzie's evidence in chief on page 540 of the transcript. It appears that whereas FTA TV is permitted 10-12 minutes advertising time per hour, M-Net is restricted to six minutes.

23 There is, in paragraph 7.5 of Caxton's HOA, a throwaway remark to the effect that '*The bundle would be equally attractive in the newspaper market'*. However the newspaper market was

[45] Naspers' print media interests are housed in Media24 which is a large publisher of magazines and newspapers as well as one of the largest printers and distributors of magazines and related products in Africa. Media24's main competitors in South Africa include Caxton Printing and Publishing, the Independent Group and Johncom.

[46] It was submitted by Ms Patricia Scholtemeyer, CEO of Media24 Magazines that, as to frequency of publication, magazines should be placed in two broad categories, namely weekly and monthly magazines. She indeed appeared to suggest that these occupied distinct relevant markets.[24]

[47] Ms. Scholtemeyer further contended that the other major category refers to content and the consumer at whom this content is directed. Here the main categories of magazines are women's interest, men's interest, general interest, home, parenting, youth, sports, motoring, travel, finance and various niche categories such as computing and agriculture.[25] She argued that a niche brand will generally utilise a niche magazine in order for it to reach its target market. According to Ms Scholtemeyer the main drivers of competition are content, visibility and availability.

[48] Again the relevant market has not been rigorously identified by the various participants involved in the assessment of this merger. Hence both appear to analyse the magazine market as though it were a single homogenous market, despite the evidence cited above regarding distinct categories of magazines. Hence with reference to the various consumer niches referred to it is clearly unlikely that an increase in the price of gardening magazines would cause the readership to

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never seriously canvassed in the evidence or the argument and, on Caxton's own argument, is a patently unsustainable proposition. As Caxton acknowledges its newspaper strength is in community newspapers and much of its argument in relation to pay TV concerns it strength as a supplier of advertising space to advertisers targeting high income consumers which is clearly not the target market of community newspapers. It is accordingly difficult to discern the basis for an advertising bundle attractive to the low income (and often time and space bound) advertisers who utilise community newspapers and those who advertise on pay TV. Caxton adopted a scatter gun type approach, suitably if insufficiently restrained by the limitations imposed on the scope of its intervention, in the apparent hope that if sufficient allegations were made something would stick. We do not consider the newspaper market further. There are clearly some newspapers that may appeal to the same advertisers and the same campaigns as those that utilise pay TV. However, no evidence was presented in this regard.

24 See page 448 of the transcript

25 See page 112 of her witness statement

substitute in favour of car magazines. The segments may of course not be quite as strongly maintained – or, at least may be significantly broader – where the sale of advertising is concerned, although, again, common sense suggests that there is, from the advertisers' perspective, a strong element of segmentation between these various magazine categories.

[49] Again we decline to make a definitive finding on the relevant market or markets for the sale of advertising space in magazines. We do note however that if we view the magazine market as a single market – and none of the submissions have taken another view even though the evidence does appear to cast doubt upon it - then Naspers is clearly dominant. In the weekly magazine segment, Ms. Scholtemeyer puts Naspers' share at approximately 80%.[26] The question that immediately arises is why, if Naspers/Media24 was intent on mounting a predatory strategy in order to strengthen its position in the magazine market which it already dominates, it would have had to turn to its pay TV business for assistance. Naspers/ Media24 seems, in other words, well placed to predate in the magazine market without the costly and time consuming expedient of taking Johncom out of the pay TV business and without constructing the elaborate and, as we shall see, complex, bundles between advertising on pay TV and magazine advertising that are at the heart of the case against the merger.

The transaction's impact on competition

[50] As outlined above, there is no horizontal overlap in this transaction and, thus, no likelihood that harm to the competitive structure or competitive outcomes will emanate from that direction. There are other possible sources of harm, several of which were urged upon the Tribunal by Caxton and these we have examined. These are an allegation of likely vertical harm arising from foreclosure by M-Net and Supersport. Secondly there are alleged portfolio effects arising from the likelihood of mixed bundling.

Foreclosure

26 See Scholtemeyer's evidence on page 450 of the transcript line 24

[51] Caxton presented evidence and argument in respect of its claimed fear of possible post-merger foreclosure.[27] It argued that advertising on pay TV played an important role in promoting magazine sales and, particularly, in the promotion of new titles. Caxton averred that Naspers would deny its competitor's access to its pay TV platform for the purpose of advertising their publications. Although it attempted to make something of these allegations in its initial submissions to the Tribunal, Caxton does not, in the end, appear to have persisted with these inasmuch as they merited no mention in its final argument. This is not surprising because none of the evidence presented bears out the contention that Caxton has made much use of TV advertising in general, much less pay TV in particular, to promote the sale of its magazines. Even if we assume that Caxton's contention that there is a separate relevant market for advertising on pay TV is correct, there is no evidence that advertising on pay TV constitutes an important input in the market for magazine publication.

[52] In its analysis of the foreclosure theory of harm the Commission requested Caxton to provide it with its advertising revenues figures. From the responses it emerged that 91% of the Caxton group's advertising spend was in the print media, 2.8% of its spend was accounted for by radio advertising, while television media accounted for 5.6% of its advertising spend. It is clear then, as is borne out from the table below; that the total advertising spend of Caxton on television is very small. The evidence shows that Caxton's spend on M-Net, the target firm, is less than 1% of its total advertising budget.[28]

Table 1

Television	**2006**	
	Rand	**Percentage of total Advertising spend**
SABC	1 326 100	3.5%
Etv	350 000	0.9%
M-Net	309 450	0.8%
DStv	145 350	0.4%

Source: Competition Commission

27 In its founding affidavit (Intervention Application) on paragraph 36.1 Caxton submits: "*In fact, the applicant's concern is not primarily that Naspers will favour its own publications by providing preferential pricing, but rather that it will foreclose the applicant's access, in particular to prime time slots, and therefore disadvantage the applicant in competition.*"

28 See page 15 of the Commission's recommendations.

[53] On the basis of this data alone we would have to conclude that advertising on pay TV represents a relatively insignificant part of Caxton's advertising effort. We have no reason to believe that these data do not accurately reflect the promotional activities of other magazine publishers. Accordingly even if this advertising platform were to be foreclosed it would have little, if any discernible effect, on the magazine market. The foreclosure argument is devoid of all merit.

Bundling

[54] A potential consequence of this merger that has received considerable attention is the prospect that the removal of Johncom from the control structure will provide Naspers with the incentive and ability to offer bundles of pay TV advertising slots and magazine advertising space at a price lower than the sum of the individual components of the bundle.[29] It is alleged by Caxton that this package will be so attractive to advertisers and, in consequence, so weaken the competitive position of Caxton's magazine interests and, presumably, of other participants in the magazine market, that their ability to act as a competitive restraint on Naspers' magazine interests will be fatally undermined thus ultimately enabling the latter to exercise unconstrained market power. This view is essentially supported by the Independent Group in its written submission to the Commission. We note in passing that Johncom's print media interests are also potential victims of the same attack although it is content to rely on the enforcement powers of the competition authorities to prevent anti-competitive conduct on the part of the merged entity.[30]

[55] Caxton avers that it is not feasible for it to replicate the bundle, that is, that it will not be able to offer its advertisers a similar bundle. In its heads of arguments, Caxton submits:

> "*The bundle, which will obviously be attractive to advertisers, cannot be realistically replicated by Caxton since it cannot itself enter the pay-television market, cannot partner effectively with any of the existing operators to replicate the bundle, and cannot satisfactorily*

29 See paragraph 3.1 of the Intervening Party's heads of argument.
30 See page 20 of the Commission's recommendations

respond to the bundle within the magazine market." [31]

[56] Mr Gordon Utian ("Utian"), MD of Caxton, also raised a similar concern in his witness statement.

> " *Another factor in this transaction is the inability of Caxton to duplicate what Naspers is doing. Caxton is precluded from entering the radio, television and other media as a result of restrictions on cross-media ownership. This means that no other party would be able duplicate what Naspers' ability to bundle cross-media"* [32]

[57] In his oral evidence Mr. Utian submitted:

> "…*We would be in a situation that we cannot respond on television. We're not able to go along to SABC 3 or any of the SABC channels and do a deal with them of a similar nature, because from the point of view of Naspers, whether they make the money out of the internet or out of the M-Net or out of magazine publishing and newspaper publishing, it belongs and it's the same part, it's all consolidated. In our situation we have no means of competing against that particular aspect."* [33]

[58] We note the imminent entry of new competitors into pay TV. These entrants will be hard pressed to develop innovative strategies in order to compete effectively against the incumbent pay TV operator, and this may well enhance Caxton's prospects of constructing a bundled offering in co-operation with one or more of the new entrants. However, we will not make a definitive finding on this but will again assume, in Caxton's favour, that it is not possible for Naspers' print media competitors to construct a bundle with the new pay TV entrants. Because we have assumed, with Caxton, that pay TV constitutes a separate relevant market, it is not pertinent to consider the prospect of a bundle comprising Naspers' print media competitors and one of the FTA TV operators.

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31 See paragraph 7.5 of Caxton's heads of argument

32 See paragraph 27 of Utian's witness statement on page 139 of the witness statement file.

33 See Mr. Utian's evidence on page 81 of the transcript.

[59] The forms of bundling that attract the attention of competition authorities are pure bundling and mixed bundling.[34] A pure bundle is one where two goods, A and B, are only sold together. They are not available for individual purchase. Furthermore, in a pure bundle the goods A and B are offered only in some fixed proportion, such as one steering wheel and four tyres as part of a car.[35]

[60] In mixed bundling, on the other hand, goods A and B are sold as an A-B package in addition to being sold individually. The package is sold at a discount to the sum of the individual prices. (If the price of the A-B package simply equals the individual prices of A and B then this is not classified as bundling).[36]

[61] Bundling attracts no end of sophisticated theorization, not least because of the thin line between pro- and anti-competitive bundling. This is why, leaving aside the question of whether identical standards and tests should be applied to bundling and to 'ordinary' price predation, what is clear is that, at the very least, the bundling strategy must be sufficiently powerful to weaken competitive constraints to a degree that enables the offeror of the mixed bundle to exercise market power that it would not have been able to exercise in the absence of the bundling strategy. Hence we do not have to take a view on whether the tests of anti-competitive bundling requires that the bundle or a component thereof has to be offered at a price below some or other measure of cost, nor do we have to decide whether the costs of the strategy must be capable of recoupment. But it is necessary, though possibly not sufficient, to decide whether the bundle will ultimately exclude competition and thus ultimately permit the exercise of market power by the offeror of the bundle.

[62] We say that this may not be a sufficient condition to establish anti-competitive bundling precisely because, in the short run at least, the bundle itself, like predation, presumably enhances consumer welfare and that is why, in the case of predation, a showing of pricing below cost and eventual recoupment is generally necessary. In other words, if pricing below cost and recoupment are not elements of a bundling

34 See dti Economics paper No 1 " *Bundling Tying and Portfolio effects*" Yale University February 2003

35 See paragraph 2.1 page 13 of the paper mentioned in footnote 23

36 See paragraph 2.2 page 14 of the paper mentioned in footnote 23

strategy, we cannot ignore the possibility that the bundled offering may be pro-competitive.

[63] We do not, however, have to concern ourselves with many of these complex debates now. We are not dealing with an actual allegation of bundling. We are rather being asked to decide whether the merger will likely lead to the offer of a bundled advertising product. Only if we decide that it will do so, will we be required to examine whether the bundle that is likely to emanate from the transaction is likely to lessen competition. However, as we shall elaborate below, in our view the argument falls at the first hurdle: that is we do not accept that the merged entity will have either the incentive or the ability to supply the bundle in question.[37]

[64] The bundle feared by the opponents of the merger is a mixed bundle comprised of advertising on pay TV and advertising in Naspers' stable of magazines. As already elaborated Caxton's argument is that Johncom's departure from the M-Net/SuperSport control structure will enable Naspers to use its alleged market power in pay TV to support its magazine interests or, conversely, to undermine its competitors' magazine interests. This would then so damage the competitive structure of the magazine market that Naspers would be able to exploit the market power accrued in consequence of its bundled offering with consumer welfare the ultimate victim. In short, Caxton's theory is that the pay TV market is the instrument whereby Naspers leverages its dominance from one media market – pay TV – to another – magazines.

[65] Caxton has ultimately chosen to focus its argument on a bundle that combines hitherto unused advertising slots on pay TV with advertising in Naspers' stable of magazine. It is not surprising that these unused slots should have made a belated appearance on centre stage because, absent the inclusion of the unused slots in the bundle, the opponents of the merger would, at the very least, have to identify the incentive for Naspers' pay TV operator, or its print media operator, or both, to discount their offerings in order to offer a discounted mixed bundle. This

37 This approach is broadly consistent with the test proposed by Caxton in which the ability and incentive to engage in bundling precedes an analysis of the likely effect on competition of the bundling strategy. See Caxton's HOA Para 15.4

they have failed to do.[38]

[66] We, for our part, cannot discern any conceivable incentive for Naspers to reduce prices on any of its prime time or near-prime time pay TV advertising slots (that is, on its currently used slots) in order to promote advertising sales on its magazines, when, it appears, that the margins it earns on the former significantly exceed those earned on the sale of advertising in its magazines.[39] The likelihood of Naspers following this approach is further reduced if one accepts, with Caxton, that M-Net and SuperSport have pricing power in the sale of prime time and near prime time advertising slots which, moreover, on Caxton's version, are 'must have' products for advertisers. Mr. Peter McKenzie, the CEO of Oracle Airtime Sales, testifies:

> "I fail to see the motivation and in the last few days a lot of people have been talking about demand. Mr. Patterson talked about it yesterday. The lack of inventory, and I stress most particularly on the most significant channels in the prime-time. He was quite correct in saying that on a lot of the lower demand, smaller channels in DSTV, there was ample inventory. But advertisers naturally flock to the most attractive channels and most attractive spots. So as far as we're concerned keeping discounts to a minimum is a key dynamic in the business in that if you're going to improve your yields per spot by one or two or 3 percent, at the end of the year you're making an enormous difference to the value of your inventory.
>
> *At times in fact, we have incentivised our sales force to reduce discounts as an additional incentive. Part of their remuneration*

38 This is what Caxton has said: *'Naspers will be able to put together a bundle without incurring significant additional costs and without necessarily forgoing significant profits. It can use the warehouse of unsold TV slots that M-Net/Supersport currently has in its inventory and it can, if it wishes to, forgo some of the returns on the filled slots in order to bolster its market power in the publications market'.* Caxton's HOA Para 7.4

39 When questioned on this very point by the Tribunal, counsel for Caxton could put Naspers incentive to bundle no higher than the following: '*Plainly they would have to make that evaluation from time to time and it might be a very nuanced evaluation and they might use this strategy only to a limited extent. I accept that. How much they would use it and how determined they might be to seek to attenuate Caxton or the other competitors' market power within the magazine markets or even to the extent of driving them out, is a matter that is very difficult to evaluate.' (*Transcript p781)

package, we set targets for them and if they bring in discounts lower than those targets, there's a cash incentive for them. So where you've got a situation where inventory is limited, there is over-demand for it, why would you want to bundle."[40]

[67] Nor is it easy to discern the incentives to lower the prices of the magazine component of the bundle.[41] Ms. Scholtemeyer, the CEO of Media24's magazine division, observed that both Oracle and Media24 are, by and large, achieving their rate card rates and as result there is no incentive for either company to bundle and forego revenue.[42] At very least, given Naspers' apparent dominance of the magazine market, we remain to be persuaded that a predatory strategy, or, even, merely a strategy that involved robust price competition, could not be mounted by the magazine division acting on its own, that is without the necessity of a bundled product that involved a pay TV component. In short, Naspers' putative ability to predate or engage in robust competition in the magazine market derives from its dominance in magazines; it does not derive from the merger before us.

[68] And so those who purport to fear a mixed bundle are forced to rely on the likelihood of a package that comprises magazine space and hitherto unused pay TV advertising slots. This is a notionally conceivable bundle (although as we shall show later one that would be extremely difficult to actually construct). However it doesn't appear to be particularly attractive. It certainly doesn't appear to be sufficiently attractive to herald Caxton's near demise and that of other competitors in the magazine market, or, at least, a sufficient weakening of the competitive structure of the market so as to enable Naspers' magazine division to achieve a greater degree of market power post-merger than it already possesses. In short we cannot understand why throwing in an unused slot in what is graphically referred to as 'dog time' will significantly enhance the attractiveness of Naspers' magazine advertising or, conversely, significantly reduce the relative attractiveness of Caxton's magazine

40 See ttranscript page 554. McKenzie later explained that there is a degree of discounting for prime time advertising slots but that usually occurs because certain large advertisers commit to significant expenditure in advance and, in exchange for the certainty that their upfront commitment gives to Oracle and its clients, the pay TV channels, they frequently receive an effective discount over and above the fee that may be able to be earned on a spot sale. Transcript p568

41 Nor is it Caxton's theory but we will briefly examine it for the sake of completeness.

42 See her evidence on page 467 of the transcript. She also submitted on page 471 of the transcript that she saw no commercial value in bundling.

advertising.

[69] After all, it was presumably not without reason that, despite the attraction of prime and near prime time slots on pay TV and despite, on Caxton's version, the 'must have' nature of pay TV advertising, these slots remained unused. Counsel for Caxton argued that the reason why these slots were not utilized is because technology to accurately measure the 'dog time' audience was not available and hence the time could not be priced. Caxton then grasped at testimony by Mr. McKenzie, the MD of Oracle, to the effect that improved technology for measuring audience participation was being developed.[43] However the argument that this was the critical missing factor that would enable pay TV and the advertisers to price this offering is thoroughly unpersuasive.

[70] We cannot accept that, had those slots possessed any commercial value at all, advertisers desperate for greater access to time on the allegedly 'must have' pay TV and profit maximizing pay TV managers would not have found each other in the market. Indeed the unused slots seem at most to possess the attraction of the free toy that MacDonald's gives away with its kiddies' hamburger pack. It's a ploy that may momentarily attract some children, but the beef, so to speak, remains in the hamburger and that's what the adult pays for, that's what the paying customer purchases. In this vein, if Naspers were to construct a bundle designed to enhance its magazine offering relative to those of its competitors, it is difficult to conceive of the cheap toys that are the unused slots making the material difference to advertising decisions in the magazine market, the more so when there are no irrational children to influence the purchase decision.

[71] Mr. McKenzie conceded that advertisers on pay TV were, on occasion, offered free access to these unwanted slots. Caxton's counsel presented a hypothetical in which the SABC made a bundled offering to advertisers – a bundle, that is, across the SABC's various FTA TV channels - and asked McKenzie how Oracle would respond. While the fact that the intercession of a 'fairy godmother' replete with magic wand was necessary to construct this hypothetical made it

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43 See McKenzie's evidence on page 536 of the transcript. See also Patterson's evidence on page 375 of the transcript

somewhat less instructive than may have been intended, McKenzie nevertheless conceded that:

> "What I would probably do is utilise to a greater extent the on sold (sic, read 'unsold') inventory that you know I have access to on the lesser popular DSTV channels and that is the luxury we have because we live in a multi channel television worlds, as opposed to the SABC who have three analogue B red (sic) channels. They don't have the unsold inventory that we have.[44]

[72] While the possibility of bundling advertising on a number of television platforms is consistent with evidence concerning the bundling of advertising space in a number of magazines belonging to a broad category, McKenzie firmly rejected the contention that a bundle comprising these slots and space in Naspers' magazines could be used to induce advertisers away from Naspers' print media competitors. McKenzie explained:

> "But there is no attraction for me to bundle it with print, because if I do that the only attraction in a bundle in the sense I think that you are talking about is that I would delivery (sic) prime inventory. You cannot bundle just with off peak down time. Those advertisers are going to want you to bundle all of your advertising. So that will include the prime time, then I am back to my problem of having to discount what is high demand airtime and I incur a greater discount, it doesn't make sense. [45]

[73] In summary we cannot discern the incentive that would cause Naspers to offer discounted Pay TV advertising slots in prime time or near-prime time as a mechanism for leveraging its market position in the relatively low margin magazine market. And the notion that this bundle would focus on the unutilized 'dog time' slots is certainly a case of barking up the wrong tree – bear in mind that we are asked to accept that, for the privilege of advertising on pay TV's 'dog time' slots, advertisers

44 Transcript p 594
45 Transcript p 594-5

will forego advertising in major magazines which they have willingly supported for years. Nor do we see why Naspers, with its dominant position in the magazine market itself, would have to turn to the pay TV market to employ a predatory or even merely an aggressively competitive strategy in magazines.

[74] Nor do we believe that Naspers could easily construct the bundle that Caxton apprehends. It is, of course, notionally possible for Naspers' pay TV and magazine divisions to construct a bundle. However the evidence of Ms. Scholtemeyer and Mr. McKenzie persuades us that it would, in the real world, be extraordinarily difficult to actually construct such a bundle. Mr. Brassey, Caxton's counsel, derided the evidence of Ms. Scholtemeyer and Mr. Mackenzie, which went to the practical difficulties in creating a mixed bundle. They were disparaged as mere 'functionaries' incapable of seeing the strategic opportunity in bundling and with insufficient authority and insight to take the decisions necessary to pursue a bundling strategy. We by contrast found their evidence persuasive precisely because they clearly outlined the practical difficulties in constructing a bundle of pay TV slots, much less unused pay TV slots, and magazine space.

[75] Indeed even if there had been evidence that the strategic leaders of Naspers were contemplating a bundling strategy (and there is scant evidence of this), on the basis of the evidence of Scholtemeyer and Mackenzie we may well have concluded that it was the strategists who had their heads firmly in the clouds and whose grand plans would ultimately have been defeated by the operational difficulties attested to by the respective operational managers responsible for Naspers magazine interests and for the sale of advertising on pay TV.

[76] It is worth recounting at some length Ms. Scholtemeyer's persuasive assessment of the difficulties entailed in bundling magazine and TV advertising:

> "Well the logistics would be quite difficult, I would think. First of all we would have to look at each of the clients that advertise both in magazines and on television. So, we would have to find the common denominator. What we would then have to do is to try to find good reason as to why we could approach those clients to offer them a

bundle and no doubt….I think what would make life difficult is you would not be able to offer it to one client. You would have to offer it to all clients that would advertise across both or try and entice people to advertise across both.

So, you would then run into the difficulty with your television advertisers where they want a specific slot at a specific time, be it prime time or whatever and in the magazine they want a specific slot. Let's say they want the inside front cover or they want the back cover. So you would now have multiple clients where you are trying to juggle multiple positionings and trying to keep them all happy. I think it would make the management of those clients' wants and needs quite difficult.

I think already, as it stands with television and magazines being separate, we find those things quite difficult as it is, because clients are always jostling for which position they want in the magazine and I assume on television it's exactly the same. So that in itself would be very difficult and, as I say, you wouldn't be able to offer it to one client or two. You would have to offer it to all your clients. So, that would be difficult.
You would then have an administrative difficulty in that you would probably have to restructure your sales teams completely as to how to call on clients, how they sell, what their offer is. You would have to retrain all of them, because magazine people have never worked in television or, if they have, some have perhaps, but they don't know television and vice versa. I mean I have certainly never worked in television. So I don't understand the television business.

So there would be restructuring, retraining, there would be the cost of administration. You would have to look at how you incentivise them. As has already been pointed out, the cost of television advertising far outweighs magazine costs advertising, so it would just…I think it would become an administrative and logistical nightmare."[46]

[77] Ms. Scholtemeyer also noted that the structure of remuneration differed as between the magazine and television advertising sales staff and that, were bundling to be introduced, these structures would have to be revisited.[47]

[78] The difficulties in bundling from the perspective of television advertising sales are also clearly outlined by Mr. McKenzie:

46 Transcript pp 467-8
47 Transcript pp 469-70

"…the deal, the overall arching deal is done at the beginning of the year, but thereafter there is a very detailed programme of handling that business campaign-by-campaign, brand-by-brand. And I think its maybe one of the essential differences between print and television. It is, and I don't mean to be derogatory, but its more dynamic in the sense that a lot happens on a daily basis. We don't plan a campaign, as happens in print, you book it and by and large it runs fairly smoothly.

We are moving, trafficking as we call it, between 30 and 40 000 spots a month. There are daily cancellations, re-bookings, the duration of spots change from 15 seconds to 30 seconds and back to 45, the programme line-up changes, just managing it is a monumental task in itself and very sophisticated software has to be developed to do so. And it is perhaps another reason why in a practical sense, this concept of bundling, whilst theoretically it sounds great, but at a practical level is pretty impossible, I believe.[48]

[79] The practical difficulties entailed in constructing a bundled print and TV advertising offering were reinforced by Mr. McKenzie under cross-examination and are worth citing at length. McKenzie prefaces his comments as follows:

"Let me make a point upfront we do not see any motivation to bundle, because it simply would dilute the yield that we would get from our advertising, sold advertising particularly the prime time slots.[49]

[80] He continues:

…I have already stated that we do our best to keep our discounts down, but on a practical level the time lines and the process of buying advertising differ hugely between print, particularly monthly magazines and television. If we were interested in bundling, it would

48 Transcript p554
49 Transcript p592

most likely be with the upmarket glossy magazines in the Naspers stable they happen, as we heard this morning to be monthly hence the time lines happen to be longer.

The deadlines for material, the deadlines for booking you are talking weeks if not months. I have also mentioned that in our case we release our red (sic, read 'rate') card three months in advance, but similarly I said that on a daily basis we are changing spots literally we will be changing spots today for broadcast tonight. So the whole process of planning and buying advertising in those two environments are not only hugely different, but in a way there is a degree of conflict between them. So that is a second reason.

The third thing is advertisers want to know about content on channels. We have a frontline sales team that deals with each of these media agencies, but behind them there is a second tier sales force who are dealing with the channels on a daily basis to find out what the content is, what the spikes are in those schedules, what is the most attractive programming, what is going to the most attractive advertising content. It is a huge amount of information as you can imagine across 35 channels. They prepare the ammunition for the frontline sales team. So that is complicated enough as it is.

Could you imagine if we had to transfer that bulk of information from our television environment to 12 different print sales teams and try and get them not only to understand the television business, which Mrs. Scholtemeyer was worried about this morning, but to give them a level of understanding of what is happening in each of those 35 channels it is just not a practical proposition.[50]

[81] The operational difficulties confronting the construction of a mixed bundled offering that were identified appear daunting to say the least - even Caxton's counsel

50 Transcript pp 593-4

was forced to concede that '*it sounds a terrible prospect.*'[51] This is possibly why the evidence from South Africa suggests only one short-lived and unsuccessful attempt at mixed bundling,[52] and why Caxton's international expert was unable to identify a single instance of mixed bundling in the international markets of which he had experience.[53] McKenzie also testified that:

> "…in my fourteen years within the group never once, not once has either my director manager, or anyone else in the organisation had any influence or tried to affect our pricing or our pricing strategy not once. We have complete discretion over it. My brief is to maximise to the best of my ability the advertising income onto the platform and to optimises the value of that and to increase our market share.[54]

[82] Note too, the following exchange between the Tribunal and Mr. McKenzie:

> Mr. Manoim: *Are you aware whether overseas on a channel say like Sky there is bundling, cross media between subscription television and print media?*

Mr. McKenzie: *We have a close working relationship (with) the Sky and Media sales team on a number of levels. I mentioned that we are emanating (sic) their research methodology. The short answer to that is no, I don't. We have also studied how they go about packaging, pricing, marketing their airtime and at no stage have they even mentioned print or their access to print within a greater news core stable.*[55]

[83] This absence of any evidence, anywhere of print and television advertising bundles is, on its own, sufficient to cast significant doubt on the salience of a mixed bundling strategy. It is also telling that while Ms. Scholtemeyer readily conceded that discounted bundles are offered to advertisers utilising more than one magazine in the same category, there has not even been any bundling of magazine advertising and newspaper advertising.[56]

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51 Transcript p 594
52 See page 606 of the transcript. See also transcript on page 547**[CONFIDENTIAL]**
53 See Marshall's evidence on page 225-226 of the transcript
54 Transcript p 597
55 Transcript p 604
56 Transcript p 471

[84] Nor was a real attempt made to controvert the evidence of Scholtemeyer and McKenzie. Counsel for Caxton relied on his efforts to shoot the messenger, to question the expertise of the witnesses, and, particularly, to disparage the notion that their little 'administrative' difficulties would disturb a grand strategy decided upon in the higher reaches of the Naspers empire.[57] These efforts by Caxton stand in marked contrast to our assessment of the witnesses. McKenzie's testimony was well informed and candid, and Scholtemeyer, despite attempts to use the recent scandal involving the falsification of circulation numbers in Media24 to discredit her, was a persuasive witness.

[85] Caxton attempted to make something of Scholtemeyer's admission that she knew little about the market for the sale of advertising on pay TV.[58] In our view, this reinforces our conclusion that a mixed bundling strategy is unlikely – surely, if it were being seriously contemplated, then at least we would have expected the Naspers strategic leaders to have ensured that the head of their magazine interests possessed the knowledge required to construct and manage the bundles.

Order

[86] The merger before us is unlikely to lead to a substantial lessening of competition. Nor does the transaction raise any public interest concerns. It is accordingly approved unconditionally.

Costs

[87] It has not been our practice to order costs in a merger hearing. However in this instance we have been asked by the merging parties to order the intervener to

57 See Caxton's heads paragraph 10.3.2 the last sentence where it is submitted that " It is hardly likely that Naspers would surrender its strategic objectives in favour of established systems or logistic convenience"

58 See the transcript page 465 lines 1-3

pay the costs incurred by the merging parties in meeting the allegations made by the intervener.

[88] On the facts of this case, it is, in considering a costs award, of some pertinence that neither the intervention itself, nor the scope of intervention ultimately permitted by the Tribunal (those surrounding allegations of likely foreclosure and bundling), was opposed by the merging parties. Indeed the grounds for intervention that were opposed by the merging parties – notably the question of cross-subsidisation – were refused by the Tribunal.

[89] However this is not dispositive of the question of costs. Because of the prospect of protracted litigation it is rarely in the merging parties' interest to oppose intervention. Indeed the attempt by the merging parties to limit the scope of intervention, gave rise to a hearing before the Tribunal and a review in the Competition Appeal Court. This prolonged the decision making period and raised its already significant costs. And this, let it not be forgotten, arose from a limited request by the merging parties around the scope of intervention, a request that was upheld by the Tribunal. It is not difficult to imagine that outright opposition to intervention would have occasioned even lengthier and more costly litigation, including, doubtlessly, the ventilation of constitutional issues. Thus the decision not to oppose the intervention should not count against the merging parties in deciding their application for costs – it is as likely to have arisen from a pragmatic evaluation of the prospect of prolonged and costly litigation as from a view that the grounds of intervention were legitimate.

[90] There are compelling general public policy grounds for permitting intervention, for adopting, as we have consistently done, a permissive approach towards applications for intervention. Not only does this approach encourage widespread participation in matters of considerable public moment, but the intervention process frequently contributes significantly to the quantum of information and quality of argument submitted to the Tribunal. For these reasons we would be reluctant to discourage intervention by the threat of an adverse costs order imposed on the prospective intervener.

[91] However, there are equally important public policy grounds for approaching intervention applications with a degree of scepticism. They are heaven sent opportunities for competitors of the merging parties to harass and delay the conduct of legitimate business on the part of prospective merging parties, and, assiduous

efforts to protect confidential information notwithstanding; they offer significant opportunities for gathering information, which for a variety of reasons may even prove inimical to competition let alone narrow commercial interests. For example, it is clear that a rigorous examination of the likelihood of cross-subsidisation would have afforded a golden opportunity for trawling through the inner workings of the merging parties.

[92] When deciding on an application for intervention we must then exercise our discretion by balancing the considerations outlined above.

[93] In this matter, we limited the scope of intervention by excluding the issue of cross-subsidisation principally because it was absolutely clear that the prospect of cross-subsidisation, even if it were a legitimate general concern arising from the merger process (and there are solid grounds for doubting this), could not, in this instance, have been merger specific. That is, Naspers' ability to use its pay TV revenues to bolster one of its other divisions does not depend on the merger – if it wished to cross subsidise its magazine division it could do so by utilising its existing revenues including those that derive from its pay TV interests.

[94] While in this matter it proved relatively easy to discern that the cross-subsidisation allegation could not possibly be merger-specific, it is frequently not possible to decide whether there is any substance in an allegation of likely harm to competition without a full hearing on the merits. And so we adopt a generally permissive approach to intervention, trusting that considerations of good faith will limit the filing of intervention applications that are devoid of any merit on competition or public interest grounds, but that are rather designed simply as fishing expeditions or as instruments of delay.

[95] We have found against the intervener both on the allegations relating to bundling and those related to foreclosure. This, in itself, is of course not grounds for arguing that the intervention should not have been made. The bundling issue was examined by the Commission and there is little doubt that the Tribunal would have conducted a detailed analysis of it – it did not require the intervention to alert the authorities, including the Tribunal, to the necessity to examine the bundling. That it ultimately proved to be of no concern from a competition perspective is neither here nor there – the very character of the acquiring firm defined bundling as an area for examination.

[96] The foreclosure issue is quite another matter. It could not have been obvious that this was an issue that warranted examination; indeed that it even reared its head as a potential implication of this transaction. It was placed before us by the intervener who was, unlike the Commission or, certainly, the Tribunal, well-positioned to know whether there was any merit whatsoever in this ground for intervention. In the event it proved to be thoroughly devoid of substance. This much became clear as soon as the miniscule role that pay TV played in the promotion of magazine sales was revealed. This is information that the intervener possessed in advance of the hearing and yet it chose to persist with the intervention on these grounds and, indeed, persisted in this until final argument. In other words, the merging parties were obliged to incur the costs of dealing with a thoroughly spurious argument.

[97] In our estimation this comes as close to a bad faith intervention as we are prepared to permit. The panel has engaged in lengthy debate on the question of awarding the merging party the costs entailed in defending the foreclosure allegation. Although we have ultimately decided not to award costs on this occasion, we take this opportunity to signal our willingness, in principle, to make such awards in future. An intervener who predicates its intervention on nothing other than envy of a competitor's success, or on the opportunity it affords for derailing a legitimate business decision and, in the process, garnering sensitive competitive information, should, at very least, thereby make itself vulnerable to an adverse costs order.

____________________	**24 January 2008**
D Lewis	**Date**

Y Carrim and N Manoim concurring.

Tribunal Researcher	**: J Ngobeni**
For Naspers	: Adv MJD Wallis SC with Adv NH Maenetjie instructed by Werksmans
For the Intervener	: Adv MSM Brassey SC, Adv Symon SC and Adv M Wesley instructed by Deneys Reitz Attorneys
For the Commission	: Dumisani Motsamai