

**COMPETITION TRIBUNAL  
REPUBLIC OF SOUTH AFRICA**

**Case No: 59/LM/Oct03**

**In the large merger between:**

**The Tiso Consortium (comprising of Investec Bank Ltd, Multi-Direct Investments 180 (Pty) Ltd, Capricorn Capital Partners Holding Co (Pty) Ltd, Mineworkers Investments Co (Pty) Ltd (“MIC”) and Safika Holdings (Pty) Ltd)**

**and**

**New Africa Investments Limited (“NAIL”)**

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**Reasons**

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1. On 28 January 2004, the Tribunal conditionally approved a merger between the Tiso Consortium (“Tiso”) and New Africa Investments Limited (“NAIL”). The reasons for our decision are set out below.

**Merger transaction**

2. This merger entails the acquisition by the Tiso Consortium of the controlling shares in NAIL.

**Background**

3. On the 28 May 2003 the board of NAIL published its intention to sell its media assets. The board extended an invitation to all interested parties to express an interest in acquiring all the shares in NAIL, its assets or to conclude a merger transaction.<sup>1</sup>
4. The NAIL board received two rival bids, one from the Tiso Consortium and another from a consortium that included the Kagiso and Johnnic Groups (“the Kagiso Consortium”). These two bids were different in terms of their respective financial structures, more importantly, the Tiso offer was not subject to approval by the competition authorities.

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<sup>1</sup> See page 11 of the record.

5. When the Tiso offer became unconditional, the Kagiso Consortium brought an urgent application to the Tribunal, requesting the Tribunal to interdict the further implementation of the Tiso offer.<sup>2</sup> The application was premised on the allegation that the Tiso offer was a merger that was being implemented without prior approval of the competition authorities and therefore contravened section 13(A) 3 of the Act.
6. Pursuant to the Tribunal's decision on the urgent application, NAIL and the Tiso Consortium filed a large merger notification with the Commission on the 16 October 2003. At the time of the notification the Tiso Consortium had acquired the majority of the entire issued share capital.<sup>3</sup> However, the parties maintained that the transaction was not notifiable in terms of the Act and reserved their rights in this regard.<sup>4</sup> We have not been asked by the Tiso Consortium to decide the issue of the change of control, therefore we assume that the transaction constitutes a merger.
7. The Commission conducted its merger investigation and recommended a conditional approval of the merger, which is the subject of this decision. In its report the Commission noted that it was investigating the potentially premature implementation of the transaction by the parties.<sup>5</sup> That issue is presently not before us and we do not need to consider it.

## **Parties to this transaction**

### **The Tiso Consortium: the primary acquiring firm**

8. Tiso Consortium comprises the following five entities: Investec Bank Limited (35%), Mineworkers Investment Company (Pty) Limited (20%), Multidirect Investments 180 (Pty) Limited (20%), Capricorn Capital Partners Holding Company (Pty) Limited (20%), and Safika Holdings (Pty) Limited (5%).

A brief profile of each of the Tiso Consortium members follows.

#### **8.1 Multi-Direct Investments 180 (Pty) Ltd (“Multi-direct”)**

- 8.1.1 This is a wholly owned subsidiary of Tiso Capital Partners No. 2 (Pty) Ltd (“TPC2”), the general partner of the Tiso Private Equity Fund 1 En Commandite Partnership (“TPEF”). TPC2 is a wholly owned subsidiary of Tiso Group (Pty) Ltd, a majority black-owned and managed natural resources and financial services group. TPC2, in its capacity as general partner of TPEF, holds investments on behalf of TPEF.

- 8.1.2 The Tiso Group (Pty) Ltd shareholding is as follows: Tiso Investment Holdings (Pty) Ltd (“TIL”) (45%), Investec Limited (24%), Tiso

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<sup>2</sup> Tribunal case no. 54/FN/Oct03.

<sup>3</sup> See the page 3 of the transcript.

<sup>4</sup> See letter from Moss Morris to the Commission, dated 16 October 2003 at page 5 of the record.

<sup>5</sup> See page 13 of the Commission's merger report.

Foundation (20%), Staff Share Trust (9%), and Dandala Family Trust (2%). Three individuals, namely Messrs. Fani Titi, Nkululeko Sowazi and David Adomakoh, own TIH in equal shares.

## **8.2 Safika Holdings (Pty) Ltd (“Safika”)**

8.2.1 Safika, established in 1994, has interests in telecommunications, media, information technology, real estate, human resources development, financial services and mineral resources.

8.2.2 According to the parties, there is no single firm that controls Safika<sup>6</sup>. Safika’s shareholders are:

- ✂✂ Fulloutput 150 (Pty) Ltd (34,05%)<sup>7</sup>,
- ✂✂ The Bunang Trust (34.05%)<sup>8</sup>,
- ✂✂ The Macozoma Family Trust (8.8%)<sup>9</sup>,
- ✂✂ Aurora Assets (SA) (Pty) Ltd (4.1%)<sup>10</sup>,
- ✂✂ RS Chauke (4,5%),
- ✂✂ S Ndukwana (4,5%)<sup>11</sup>,
- ✂✂ Cleves Investments (10%) and
- ✂✂ The Safika Trust to be formed.

8.2.3 Safika has two wholly owned subsidiaries namely, Safika Technologies Holdings (Pty) Ltd and Bubesi Investments (Pty) Ltd.

8.2.4 Safika has further interests in the following firms: Logical Options (Pty) Ltd 28%, Safika Tel (Pty) Ltd 70%, Safika Projects Execution Group (Pty) Ltd 51%, STANLIB Ltd 12,85%, Andisa Capital (Pty) Ltd 14,79%, Benefit Recovery Services (Pty) Ltd 26,3%, Safika Products (Pty) Ltd 51%, Umdlalo Fashions (Pty) Ltd 53%, Safika Resources (Pty) Ltd 85%, Umsongo Biotechnology (Pty) Ltd 40%, Safika Communication Engineering (Pty) Ltd 51% and Safika Asset Finance (Pty) Ltd 51%.

8.2.5 For our purposes the holding of significance is its 34.99% stake in Phaphama Holdings Ltd, which is NAIL’s controlling shareholder prior to this merger.

## **8.3 Investec**

8.3.1 Investec is a wholly owned subsidiary of Investec Limited, a public company listed on the JSE Securities Exchange. Investec is a,

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<sup>6</sup> See the acquiring firm’s CC 4(2), page 81 of the record.

<sup>7</sup> Mr Vuli Cuba, a director and CEO of Safika controls Fulloutput 150 (Pty) Ltd.

<sup>8</sup> The Bunang Trust has as its trustees Mr EN Banda, Mr MM Moselekwa and Mr SD Read. Mr MM Ngoasheng, a director and chairman of Safika is the beneficiary of the Trust.

<sup>9</sup> The trustees of the Macozoma Family Trust are SJ Macozoma, MM Ngoasheng and BT Nqcuca. The beneficiaries of the trust are Mr Saki Macozoma (a director and deputy chairman of Safika), his wife and children.

<sup>10</sup> Marc Ber (a director of Safika) and Lesley Ann Ber control Aurora Assets (SA) (Pty) Ltd.

<sup>11</sup> Both Messrs. RS Chauke and S Ndukwana are directors of Safika.

specialist-banking group that provides a diverse range of financial products and services to a niche client base.

8.3.2 The majority shareholders of Investec are Public Investment Commissioner (SA) 13,8%, Fintique III (BVI) 9,7%, Old Mutual Life Assurance (SA) 7,3%, Sanlam (SA) 3,4%, Fedsure Assurance Limited (SA), Liberty Life (SA) 1,8%, Deutsche Bank AG (UK) 1,8%, and RMB (SA) 1,7%.

Investec has a number of national and international subsidiaries.

#### **8.4 Mineworkers Investment Company (Pty) Ltd (“MIC”)**

8.4.1 MIC, incorporated in June 1995, is a wholly owned investment company of the Mineworkers Investment Trust (“MIT”). The beneficiaries of the trust are mineworkers, construction and energy workers and their dependants. MIC is currently invested in the media, petroleum, security, workplace retailing, leisure and financial services sectors.

8.4.2 MIC’s subsidiaries include Erinridge Investments (Pty) Ltd 95%, MIC Financial Holdings (Pty) Ltd 95% and Fleetbridge Investments (Pty) Ltd 100%.<sup>12</sup>

8.4.3 In addition to the abovementioned three subsidiaries, MIC holds shares in a number of firms, including Primedia Limited (19,7%). *This is the shareholding that is of interest in this merger.*

8.4.4 MIC and the Kirsch Consortium have concluded a voting pool agreement in respect of Primedia Limited. As a consequence of the voting pool agreement, MIC and the Kirsch Consortium are collectively entitled to exercise approximately 30,5% of the total votes in Primedia. Primedia’s assets include Primedia Publishing, three radio stations, namely 94.7 Highveld, 702 Talk, 567 Cape Talk, and Primedia Outdoor.

#### **8.5 Capricorn Capital Partners Holding Company (Pty) Ltd (“Capricorn”)**

8.5.1 This is a specialised investment management company focused on investment banking, private equity and alternate asset management. It acts as group corporate finance and strategy advisor to the Hollard Group and has been mandated to advise the Hollard Group and Capricorn Ventures International on NAIL. Capricorn is a management-owned company and the majority of executive directors are from the Hollard Group and are still active directors of the Hollard Group.

8.5.2 The current shareholders of Capricorn are the Geoff Snelgar Family Trust (70%), Gavin Knighton Chadwick (16.7%) and Robert Fihrer (13.3%)<sup>13</sup>.

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<sup>12</sup> See page 115 of the record.

## **NAIL: the primary target firm**

9. NAIL, currently listed in the media sector of the JSE Securities Exchange, is an investment holding company with interests in radio broadcasting, media marketing, printing publications, exhibitions, film and television production, as well as “certain non-media activities”.<sup>14</sup>
- 9.1 NAIL’s shares are divided into high voting ordinary shares (“ord”) and low voting “N” shares. The ordinary shares effectively have 5 000 times the voting power of the “N” shares. Prior to this transaction Phaphama Holdings Limited held the majority ordinary shares, enjoyed 52.5% of the voting rights in NAIL and therefore controlled NAIL. Other shareholders included UBS Securities (17.8% ord), Sanlam Investment Management (7% ord), Coronation Capital Ltd (5.7% ord), Investec Ltd (14.5% “N”), Hollard (13.4% “N”), Sanlam Investment Management (12.7% “N”), Allan Gray Ltd (11.1% “N”), UBS Securities (8.7% “N”), and Metropolitan Asset Management (7.7% “N”).
- 9.2 Phaphama’s shareholders are Safika (34.9%), the Hollard Group (34.5% plus 5.2% held in trust) and Women’s Investment Portfolio Holdings Limited (25%)<sup>15</sup>. Thus at least two of Phaphama’s shareholders are also members of the Tiso Consortium.
- 9.3 Furthermore, the Commission adopted the view that Capricorn is controlled by Hollard. The parties have indicated that for purposes of the notification they do not object to this view.<sup>16</sup>

## **Firms in respect of which NAIL exercises direct / indirect control**

10. These include New Africa Media Holdings (Pty) Ltd, New Africa Books (Pty) Ltd, New Africa Broadcasting (Pty) Ltd, KFM Radio (Pty) Ltd (Cape Town), Urban Brew Studios (Pty) Ltd, New Africa Media Films (Pty) Ltd, Wildcoast Releasing (Ireland), Nail Outdoor (Pty) Ltd, Alisa Holdings (Pty) Ltd, New Africa Finance Holdings Ltd, and Prosper Africa Ltd.<sup>17</sup>
11. New Africa Media Holdings (Pty) Ltd (“NAMH”) is wholly owned by NAIL and acts as a holding company for all of NAIL’s media assets. NAIL’s subsidiaries can be divided into the following broad categories: publishing, film and television, radio, and other non-media assets.

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<sup>13</sup> See paragraph 10 of the Circular to NAIL shareholders dated 2 October 2003, at page 35 of the record.

<sup>14</sup> Refer to NAIL’s form CC 4(2) on page 525 of the record.

<sup>15</sup> This information was set out in an affidavit in the earlier interdict application and is thus part of the record of case no. 54/FN/OCT03 at page 19 of the record.

<sup>16</sup> See page 5 of the Commission’s report and the letter from Capricorn at page 1111 of the record. See also the SRP ruling dated 15 October 2003 at page 3 where the Executive Director of the SRP states that “It cannot be seriously disputed, and it is not clear that the Tiso Consortium does, that it may for present purposes be taken that Capricorn is the alter ego of Hollard.”

<sup>17</sup> See NAIL’s CC 4(2), page 514-6 of the record.

### *Newspaper and Magazine Publishing Division*

12. The publishing division comprises of New Africa Books (Pty) Ltd (“NAB”), in which NAIL has approximately a 90% interest, and New Africa Publications Limited (“NAP”), in which NAIL has a 90.5% interest.
13. NAB publishes books that cater for a broad spectrum of readers. NAP, on the other hand has a number of subsidiaries, primarily involved in the publishing of newspapers, magazines and books. NAP’s interests include the Sowetan<sup>18</sup>, the Sowetan Sunday World (“SSW”) <sup>19</sup>, Thengisa Media<sup>20</sup>, Allied Publishing Limited (“APL”) <sup>21</sup>, New Africa Publications Magazines Limited (“NAPM”) <sup>22</sup> and Sowetan Television (Pty) Ltd <sup>23</sup>

### *Radio Division*

14. NAIL’s radio assets comprise of a 37.2% stake in Jacaranda FM (Pty) Ltd (“Jacaranda”), an effective 72.9% in KAYA FM, an effective 95% in KFM, and 31.7% in RADMARK. <sup>24</sup>

### *Film and Television Division*

15. This division consists of various entities including Urban Brew Studios (Pty) Ltd (“UBS”) and NAIL Films Entertainment Group (“NFEG”) <sup>25</sup>.
16. UBS is a television production house specialising in the area of live-to-air broadcasting. NAIL has an effective 50,1% interest in UBS whilst Danie Ferreira who founded the company 18 years ago owns the balance of 49.9% of UBS in his personal capacity. <sup>26</sup>

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<sup>18</sup> This is one of South Africa’s leading daily newspaper established as a commercial newspaper in 1981. NAP has a 100% interest in Sowetan.

<sup>19</sup> SSW is operated as a joint venture between NAP and Johnnic Publishing. As per NAIL’s 2002 annual report, NAIL has a 45% interest in SSW.

<sup>20</sup> This is the advertising sales division of NAP, which sells advertising space for the Sowetan and the SSW. NAIL has 90.5% interest in Thengisa Media.

<sup>21</sup> APL is a newspaper and magazine distribution enterprise aimed at reducing distribution costs for its partners. According to the parties, APL is co-owned by NAP, Johnnic Publishing and the Independent Newspapers Group. NAIL has a 30% interest in APL.

<sup>22</sup> NAPM has a 100% interest in the publishing of “Leadership”, a monthly magazine focussed on current political and business related issues. The parties further indicated that “Leadership” is managed under contract by Kqala Media, Cape Town.

<sup>23</sup> Sowetan television is a television production joint venture with Urban Brew Studios (Pty) Ltd, a NAIL subsidiary. The Commission submits that NAIL has an effective 70.25% interest in Sowetan Television.

<sup>24</sup> The shareholders of RADMARK are NAIL 31%, Kagiso Media Limited (through a group of companies) 31.7%, Lagadere Active Radio International (France) 31.6% and Radmark Staff Share Trust 5%.

<sup>25</sup> See p. 22-3 of the Commission’s report.

<sup>26</sup> Refer to the Commission’s merger report, page 23.

17. NFEF produces feature films in a “value chain” from conception to distribution of the final product. The group comprises of various entities specialising in film production.

***Other assets (non-media)***

18. These include NAIL Outdoor (Pty) Ltd (“NAIL Outdoor”), Alisa Holdings (Pty) Ltd (“Alisa”), Union Alliance Holdings Limited (“UAH”) and SACCAWU Investment Holdings (Pty) Ltd (“SACCAWU”).
19. NAIL Outdoor is an outdoor media and signage company wholly owned by NAIL. According to the parties, NAIL Outdoor has two divisions, namely Outdoor Media and Traditional Signage.

**Product market overlaps**

20. From the above, it is clear that the primary target firm is mainly involved in the media industry. Generally, the primary target firm is active in the markets for:

- ~~☒~~ Book publishing
- ~~☒~~ Newspaper publishing
- ~~☒~~ Magazine publishing
- ~~☒~~ Radio broadcasting
- ~~☒~~ Radio advertising sales
- ~~☒~~ Newspaper advertising sales
- ~~☒~~ Newspaper and magazine distribution
- ~~☒~~ Television series production
- ~~☒~~ Corporate video project production
- ~~☒~~ Feature film production, consulting and facilitation
- ~~☒~~ Feature film marketing and distribution
- ~~☒~~ Car rental services; and
- ~~☒~~ Outdoor advertising.

21. As indicated earlier, the primary acquiring firm comprises five members actively involved in a wide range of business sectors including private banking, private equity investment and mining.

22. The Commission found that only one member of the consortium, namely MIC, through its holding in Primedia, was also active in certain of the markets in which NAIL is active, which results in the following market overlaps:

1. Magazine publishing in South Africa.
2. Radio broadcasting services in Gauteng.
3. Radio broadcasting services in the Western Cape.
4. Outdoor advertising nationally.

23. The Commission’s approach was that only markets in which the combined market share of NAIL and Primedia exceeded 20% merited possible

competition concerns. On this basis there were no concerns regarding magazine publishing, where neither NAIL nor Primedia have significant market shares.

24. However, in the radio service and outdoor advertising markets, combined market shares appear to exceed 20%. Thus in the Western Cape radio market, NAIL's KFM competes with Primedia's Cape Talk and P4. In the Gauteng radio market, Nails' Jacaranda and Kaya FM compete with Primedia's Highveld and Radio 702. In outdoor advertising, Nail Outdoor competes with Primedia Outdoor. For this reason, because of their potential to give rise to competition concerns, the Commission has referred to these Nail businesses as the 'affected assets'. This is a term that we adopted when we formulated the conditions, as will appear later.

### **Approach to the merger taken by the parties and the Commission**

25. Both the parties and the Commission have adopted a pragmatic approach to the merger. Given that the Tiso Consortium is expected to enjoy only a brief reign as the controller of Nail, they have asked, what are the potential competition concerns arising from the present merger and how can they be addressed in a way that –
- 1) does not entail a detailed enquiry into all the relevant markets prematurely;
  - 2) addresses potential, though as yet unproven, competition concerns whilst the Tiso regime persists;
  - 3) is not so invasive as to interfere with the legitimate business interests of the consortium and Nail?
26. According to the Commission the only potential competition concern that the merger raises is that occasioned by the presence of MIC in the Tiso Consortium.
27. The Commission makes the assumption that all members of the Tiso Consortium are potential joint controllers of NAIL. Since MIC is a member of the Tiso Consortium it must be considered as a controller of NAIL.
28. But, according to the Commission, MIC must also be regarded as joint controller of Primedia. This is because as we have seen earlier MIC is a significant shareholder in Primedia (19.7%) and has a voting pool arrangement with another large shareholder, the Kirsch Consortium.
29. From the Commissions' perspective MIC's relationship with Primedia creates two concerns. Firstly, as we have seen from the previous section, Primedia competes with certain of the NAIL businesses that we have labelled the "affected assets"<sup>27</sup>. The merger will lead to an

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<sup>27</sup> We have included the KFM radio station as one of the affected assets, since it was evident that KFM's market share exceeded 20%. See page 280 of the record where KFM's market share is stated as higher than 20%. The Commission had not initially regarded KFM as an



increase in concentration in those markets in which the affected assets compete with those of Primedia. If MIC is the glue that cements the relationship between NAIL and Primedia, then these concentrations may give rise to competition concerns.

30. Secondly, the Tiso Consortium has entered into an agreement with Primedia in terms of which the consortium will use its best endeavours to secure that Primedia is able to acquire the affected assets from NAIL for an amount of R218, 5 million.<sup>28</sup> The Commission is concerned that this gives MIC a conflict of interest in relation to the disposal of the affected assets.
31. Now, doubtless the Commission would concede that even if its theory of control is correct it does not follow that the merger leads to a substantial lessening of competition. It is trite that mere increases in concentration do not necessarily give rise to competition concerns.
32. The Commission at this stage has not conducted a full market enquiry but has only entered into the most rudimentary market characterisation. This is not a criticism of the Commission. It has taken this approach for very sensible reasons. This merger is intended as one step in a chain of further transactions, which will lead inter alia to the sale of many of the underlying businesses of NAIL including the affected assets. What the Commission and the Tiso Consortium seek to achieve now is to avoid lengthy market enquiries of what may prove to be an interim control situation and to save the full enquiry for the final disposals.
33. There is still much water to flow under the NAIL bridge and the best intentions of the Tiso Consortium may still be frustrated when the detailed negotiations are entered into with prospective purchasers and the concerns of regulators, which include those of ICASA. It is worth bearing in mind as well that it is not the Tiso Consortium that can sell the NAIL assets but only NAIL itself.
34. Accordingly what the Commission seeks to achieve, in the absence of a full market enquiry as to whether this relationship is problematic, is to insulate NAIL from the possible 'malign' influence of Primedia via its 'Trojan horse' in the Tiso Consortium, MIC. Thus the Commission insists that if there is not to be a full ventilation of the control and the possible resultant competition implications, the approval must be given subject to conditions that "sterilize" NAIL from MIC's and Primedia's influence.
35. The attitude of the merging parties is similarly business like. Whilst they do not concede the validity of any of the Commission's control theories, nevertheless, because they are anxious to expedite the approval

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affected asset when it drew up its recommendation as the market share was less than 20% in the survey on which it had relied. When we pointed out at the pre-hearing that Tiso's own documents reflected that KFM had a share higher than 20% the Commission agreed that it should be included as an affected asset on the basis of its 20% test.

<sup>28</sup>See page 33 of the record.

process, they are prepared to accept conditions that “appropriately” address these concerns.<sup>29</sup>

36. The Commission’s solution to the potential competition problem through the imposition of conditions has gone through various iterations. In its initial form in the competitiveness report the Commission proposed that the affected assets be sold within a certain time period after the approval of the merger. If they were not a trustee was to be appointed to do so.
37. At a pre-hearing conference held on 21 January 2004 the merging parties indicated that they had concerns about the imposition of a sale deadline and the appointment of a trustee. These concerns appear to relate to matters of commercial practicality rather than any reneging on the consortium’s publicly stated intention to sell. The major concern appears to be that if sale negotiations are more protracted and go beyond the deadline imposed upon them to divest, the Tiso Consortium would be faced with the prospect of the trustee assuming the power to sell the affected assets for it. Since the trustee’s primary obligation is to sell the affected business to a viable purchaser in the briefest time the Tiso Consortium might have to sell at bargain basement prices.
38. The Commission was sympathetic to this concern and agreed to meet with the Tiso Consortium’s representatives to devise a common position on the conditions.
39. The Commission then sent a revised draft of the conditions in which the sale obligation was omitted, but the role of the trustee was retained. In terms of the revised proposal the trustee was to:

*“ 8(a) From the date of his / her appointment until the date on which the call option is exercised or the date on which the last of the affected assets have been transferred in title (whichever occurs first)*

- (i) be present at all NAIL board meetings during discussions, deliberations and voting pertaining to the affected assets;*
- (ii) be favoured with a copy of all circulars to NAIL directors dealing with the affected assets, alternatively the specific parts of all circulars dealing with the affected assets.*

*(b) From the date of his / her appointment until the date on which the last of the affected assets have been transferred in title*

- (i) be present at all Tiso Consortium meetings during discussions, deliberations and voting pertaining to the affected assets;*

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<sup>29</sup> Primedia asked the Tiso Consortium’s legal representatives to place on record the fact that it does not accept the proposition that MIC controls Primedia for purposes of the Competition Act.

*(ii) be favoured with a copy of all circulars to the Tiso Consortium directors dealing with the affected assets, alternatively the specific parts of all circulars dealing with the affected assets.*

9. *The Trustee shall, within one month after the transfer in title of the last affected asset simultaneously provide the Commission and the parties with a confidential report discussing whether or not the parties have at all relevant times:*

*(a) maintained the economic viability and value of the affected assets; and*

*(b) adhered to the conditions imposed on this transaction.”*

40. The Tiso Consortium continued to object to the presence of the trustee and as no resolution on this point could be reached it proposed conditions similar to those of the Commission, but which omitted the obligation to appoint the trustee.
41. Precisely what role the trustee is meant to play in terms of the Commission's present proposal is unclear.
42. The Commission's chief concern is that the affected assets are not dissipated before sale, because of a conflict of interest due to the presence of MIC. It appears in the guise of both seller (as a member of the Tiso Consortium) and purchaser (as a joint controller of Primedia).
43. Since the merging parties were reluctant to accept the Commission's other proposal viz. that MIC sell its interest in the Consortium and so exit, the introduction of a trustee to monitor the disposal process is the only means the Commission has or so it argues, to see that the disposals are made without taint of conflict of interest.
44. The Tiso Consortium on the other hand sees the presence of the trustee at the various meetings and deliberations contemplated as an unjustified incursion into its business affairs. It further harbours an apprehension that the trustee's role is far from clear – just what is it that this individual is monitoring?
45. We share this concern. Whilst the Commission is correct that the appointment of trustees is not unusual as part of an antitrust remedy, and that trustees are sometimes invested with the power to prevent asset dissipation by the seller, this situation is not analogous.
46. In the first place under the revised conditions there is no longer an obligation on the Tiso Consortium to dispose of the affected assets. The trustee will therefore not be playing the customary role of the seller of identified assets. Secondly the incentive to wind down the assets, normally the rationale for appointing the trustee to monitor a firm before a divestiture is implemented, is highly unlikely in the present situation.

47. In the classic divestiture scenario the merged firm is ordered to divest an asset in an effort to restore competition. It may well be that under this scenario the merged firm has an incentive to 'cripple the assets' to undermine their competitive threat once they are in rival hands. The merged firm is willing to forego the realisation of the best price for the assets in the short term by selling a 'lemon' to the purchaser in a bid to preserve market power and hence supra market returns in the long term. It is thus a rational strategy for a seller in a divestiture scenario.
48. Those probabilities do not exist here. MIC is one member of the consortium and represents only a 20 % interest. It is unlikely that the remaining 80% would support a strategy that prevented them getting the best price for the assets, which as we saw earlier, was their rationale for doing the deal in the first place. Then, the buyer is not the would-be competitor, but MIC in its guise as Primedia. While it may have an interest in paying the lowest price for the assets it has no interest in destroying them before the sale.
49. Of course we cannot assume that Primedia is the eventual buyer of the affected assets. We must consider if a trustee is necessary in case the assets are then sold to a competitor of Primedia. Even on this scenario, MIC is unlikely to be in a position to degrade value of the assets against the wishes of its fellow consortium members who control 80%.
50. What also needs to be borne in mind is that with the exception of the outdoor advertising business, none of the other affected assets are under the sole control of NAIL. This makes an MIC inspired dissipation strategy, even if it could persuade its fellow consortium members to go along with it, even less likely to be successful.
51. We are therefore not persuaded of the necessity of the trustee condition. We are however persuaded that having a trustee in the boardroom is highly invasive of the business rights of the parties and that without proper justification should not be granted.
52. In our view the best way of insulating NAIL and the affected assets from the influence of Primedia via MIC is to ensure that MIC is not involved in the decision making in relation to the affected assets whether at the Tiso Consortium level or on the boards of NAIL and the affected assets. The TISO consortium was happy to make this concession and the first paragraph of the conditions provides for this.
53. The third and fourth conditions further insulate NAIL from the influence of Primedia. The third condition precludes Primedia and any firm that is not a member of the TISO consortium from disposing of the affected assets. Similarly, the fourth condition ensures that no veto right, pertaining to these disposals, is granted to Primedia or any firm that is not a member of the TISO consortium.

54. In our view with this change the remaining conditions provided by the merging parties deal adequately with any concerns arising from the transaction and the merger is approved subject to the conditions set out in the order, which is annexure "A" hereto.
55. It is important to stress that although this merger has been approved subject to conditions they are conditions suggested by the parties to obviate lengthy market enquires at this stage. Since the parties ultimately seek to sell the affected assets to another buyer, more than likely Primedia, a full market enquiry will take place then to see if this raises any competition concerns. For this reason one of the conditions ensures that these divestitures, if they take place, will be made the subject of notifications to the Commission regardless of whether they are below the thresholds for compulsory notification.
56. The only decision we have made in relation to the market is that the acquisition of control by the remaining members of the Consortium, other than MIC, raises no competition concerns. The conditions proposed satisfy us that the affected businesses identified in NAIL will be insulated from the influence of MIC, lest that raise any competition concerns.

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23 February 2004  
**Date**

Concurring: P Maponya, M Holden

For the Tiso Consortium:	Adv. D Unterhalter SC instructed by Moss Morris Attorneys.
For NAIL:	Mr. J Balkin, Edward Nathan & Friedland Corporate Law Advisers & Consultants.
For the Commission:	Mr. R Labuschagne, Legal Services Division, Competition Commission.