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COMPETITION TRIBUNAL OF SOUTH AFRICA

Case no.: IM141Dec19

In the *reconsideration application* between:

JSE LIMITED

First Applicant

LINK MARKET SERVICES SOUTH AFRICA (PTY) LTD

Second Applicant

And

THE COMPETITION COMMISSION OF SOUTH AFRICA

First Respondent

COMPUTERSHARE SOUTH AFRICA (PTY) LTD

Intervenor

In re the intermediate merger between:

JSE LIMITED

Primary Acquiring Firm

and

LINK MARKET SERVICES SOUTH AFRICA (PTY) LTD

Primary Target Firm

Panel:

Ms Yasmin Carrim (Presiding Member)

Dr Thando Vilakazi (Tribunal Member)

Mr Andreas Wessels (Tribunal Member)

Heard on:

18, 19, 22, 23, 24 June, 23, 24, 29, 30, 31 July,
3 and 21 August 2020

Last submission received on:

24 August 2020

Order issued on:

2 September 2020

Reasons issued on:

25 May 2021

REASONS FOR DECISION

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CONDITIONAL APPROVAL

- [1] On 2 September 2020, the Competition Tribunal (“Tribunal”) conditionally approved the proposed acquisition of Link Market Services South Africa (Pty) Ltd (“Link SA”) by JSE Limited (the “JSE”).
- [2] The reasons for the conditional approval of the proposed transaction follow.

PROCEDURAL BACKGROUND

- [3] On 4 September 2019, the Competition Commission (“Commission”) received a notice of an intermediate merger between the JSE and Link SA (the “merging parties”). The Commission found that the proposed transaction was likely to result in a substantial prevention and/or lessening of competition. The merging parties tendered a set of remedies to address the Commission’s concerns but after canvassing these remedies with market participants the Commission concluded that the conditions cannot alleviate all of the anti-competitive conglomerate effects that it says will arise following the merger.
- [4] The Commission prohibited the merger on 26 November 2019.¹ Following the Commission’s decision, the merging parties, on 12 December 2019, submitted a request for consideration of an intermediate merger to the Tribunal.² Attached to the request for consideration were proposed remedies for the conditional approval of the proposed merger.
- [5] During the Commission’s investigation, written and verbal submissions from 17 market participants were received, including submissions from Computershare South Africa (Pty) Ltd (“Computershare”) – which later became an intervenor in the Tribunal’s consideration proceedings.
- [6] The merging parties, Commission and Computershare called the following witnesses to give evidence at the Tribunal hearing:

¹ Competition Commission's Notice CC16: Prohibition Merger, dated 26 November 2019 (Trial Bundle “Bundle” A, p.1).

² Request for Consideration of an Intermediate Merger, dated 12 December 2019 (Bundle A, p.110).

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[6.1]	Merging Parties:	Dr Leila Fourie	JSE Group CEO	(factual)
[6.2]		Mr Iqbal Hanif	Link SA CEO	(factual)
[6.3]		Mr Stephan Malherbe	Genesis Economics	(expert)
[6.4]	Commission:	Mr Jacques de Bie	Head of the Outsourcing Division at Singular Systems (Pty) Ltd (“Singular”)	(factual)
[6.5]		Dr Hariprasad Govinda	Commission’s Principal Economist	(expert)
[6.6]	Intervenor:	Mr Barend Paul van Der Westhuizen	Computershare CEO	(factual)
[6.7]		Mr Patrick Smith	RBB Economics	(expert)

[7] Because the hearing of this matter coincided with the outbreak of the Covid-19 pandemic and lockdown restrictions, the parties approached the Tribunal for leave to convene a trial, with the hearing of oral evidence, over virtual platform.³

[8] After receipt of the merging parties’ further revised conditions on 24 August 2020, we found that the tendered conditions adequately address the competition concerns in the identified markets. We viewed the conditions as

³ On 18 June 2020, Tribunal hearings began with the factual witnesses’ testimonies over the following four days in June. However, on 25 June 2020, the matter was postponed after an incident of Covid-19 exposure at the premises where some legal representatives and the designated “witness box” were located. The hearing resumed on 23 July 2020 and closing argument took place on the twelfth hearing day, 21 August 2020.

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sufficient to address the main mechanisms through which any harm to competition could arise. Conditional approval of the proposed transaction was granted on 2 September 2020.

TRANSACTION

- [9] In terms of the proposed transaction the JSE intends to acquire 74.85% of the issued share capital in Link SA from Link Market Services Limited (“LMS”). The remaining 25.15% of the issued share capital of Link SA will continue to be held by LMS Partner Holdings (Pty) Ltd (“LMS Partner Holdings”). Post-merger, LMS Partner Holdings will retain 25.15% shareholding and the JSE will exercise sole control over Link SA.

PARTIES TO THE TRANSACTION

Primary acquiring firm

- [10] The JSE is a publicly listed company that is not owned or controlled by any individual, single firm or group of firms. At the date of the merger filing, the largest shareholders in the JSE were Public Investment Corporation (SOC) Ltd, Investec Asset Management (Pty) Ltd, Somerset Capital Management L.L.P. and Neuberger Berman, LLC.
- [11] The JSE owns interest in and/or controls various firms in South Africa. Most relevant to the transaction is Strate (Pty) Ltd (“Strate”), a registered central securities depository (“CSD”).⁴ The JSE has a shareholding of 44.56% in Strate and is currently its single largest shareholder. Other shareholders of Strate are banks (Nedbank, The Standard Bank of South Africa, ABSA, FirstRand Bank and Citibank N.A.), each accounting for less than 15% of the shareholding in Strate.⁵

⁴ ‘Strate’ stands for Shares Transaction Totally Electronic.

⁵ Commission's Mergers and Acquisitions Report, dated 22 November 2019 “Merger Report”, para 5.9.4 (Bundle A p.44).

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- [12] The JSE primarily operates as a licensed exchange, in which capacity it performs various licensed functions and duties in accordance with the requirements of the Financial Markets Act 19 of 2012 (“FMA”). The JSE’s activities as an exchange involve listing and issuing of company (“issuer”) securities (primary functions); and trading, clearing and settling trade securities (secondary functions). Amongst other things, its secondary functions involve management of the broker dealer accounting (“BDA”) back office system that keeps the securities records and books of individual member firms in respect of their clients, and all their securities trading and related cash and securities movements.⁶
- [13] The JSE operates three exchanges for listing and trading equities (equity market), cash bonds (bonds market), financial and commodity derivatives and interest rate derivatives (the derivatives market).
- [14] In terms of section 11 of the FMA, the JSE also performs various functions as a ‘frontline regulator’ under its Issuer Regulation and Market Regulation divisions. These regulatory activities include the supervision of issuers’ compliance with the JSE’s listings requirements; the monitoring of trading to identify any market abuse; and oversight of the JSE broking members’ compliance with their regulatory obligations.⁷ The JSE’s Issuer Regulation division is ring-fenced within the JSE through internal information exchange barriers.⁸
- [15] The JSE itself is regulated by the Financial Sector Conduct Authority (“FSCA”), which investigates breaches of the FMA in consultation with the Prudential Authority.⁹ The FSCA is tasked with overseeing system-wide efficiency and

⁶ Brokers are the only market participants that may action the buying and selling of equities on the exchange and they must be authorised by the JSE. A broker must be approved by the JSE to enter trades and, to that end, must comply with requirements such as meeting capital adequacy requirements and having qualified personnel, infrastructure and technology.

⁷ FMA sections 10(2) and 11 and Merging Parties Heads of Argument, para 38.

⁸ Otherwise known as “Chinese walls” (Expert Report prepared by the Competition Commission “Dr Govinda’s Witness Statement “WS””, para 52; Bundle A, p.461).

⁹ The Financial Sector Regulation Act, 9 of 2017 (“FSRA”) put into place a new financial regulatory oversight framework in South Africa, referred to as the ‘twin peaks’ model of financial regulation. The ‘twin peaks’ regulators, established on 1 April 2018, are the Prudential Authority (“PA”) and the FSCA.

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integrity of financial markets, consumer protection, and, among other responsibilities, monitoring the conduct of financial institutions, including market infrastructures such as the JSE.

[16] Separate from its licensed functions and duties as a licensed exchange, the JSE offers various ancillary commercial services:

[16.1] Other value-added services: hiring out of its corporate event venues, hosting roadshows, visual presentations and training.

[16.2] Information services: the provision of market data, reference data, information on corporate actions, client data, indices, valuations, business intelligence and statistics.

[16.3] The JSE is in a commercial partnership with The Meeting Specialist (Pty) Ltd ("TMS") after entering into a Service Agreement and Enterprise Development Agreement.¹⁰ TMS provides meeting management services to some issuers listed on the JSE. The services offered by TMS include the collation of proxies, manual or electronic voting at shareholder meetings, and related meeting requirements.

Primary target firm

[17] Link SA wholly owns and controls Link Investor Services (Pty) Ltd ("LIS"). LIS owns and controls Pacific Custodians Nominees RF (Pty) Ltd ("PCN"). When referring to Link SA and its subsidiaries, as a group, we refer to "Link".

[18] Link offers services to issuer clients in two broad areas: (i) transfer secretarial and registry services through Link SA and (ii) custodial, settlement and nominee services through LIS.

¹⁰ Expert Report prepared by RBB Economics "Smith WS", footnote 166 (Bundle A, p.534).

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[19] Link SA's clients for transfer secretarial and registry services are both listed companies (issuers) and unlisted companies with a large number of shareholders. This offering includes:

[19.1] Share register maintenance services: involving the maintenance of the share register of a company in terms of section 50 of the Companies Act No. 71 of 2008 (the "Companies Act");

[19.2] Treasury functions: involving calculating and managing payments or re-investing dividends and distributions from issuers, managing trust accounts, tax reporting, bank reconciliation, control of unclaimed funds;

[19.3] Corporate actions: including assisting issuers with planning, managing, and executing corporate actions such as rights issues and dividend payments; and

[19.4] Reporting and analytics services for issuers on their shareholder bases.

[20] Link SA also offers custodial and settlement services through LIS – a central securities depository participant ("CSDP"). As a CSDP, LIS holds dematerialised shares and funds in safe custody for its clients, settles all related transactions, and maintains company sub-registers. Its main function is to service issuers with a large number of retail shareholders that hold dematerialised shares.¹¹

RATIONALE FOR THE TRANSACTION

[21] The JSE submitted as its rationale for the transaction, complementarity between its licensed functions and duties and Link SA's activities. Investing in Link SA will assist the JSE to diversify its revenue streams and expand its

¹¹ Witness Statement of Iqbal Hanif "Hanif WS", para 36 (Bundle A, p.182).

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offering to the market. This purchase also offers the JSE the chance to provide issuers with a “one-stop-shop”.¹² This one-stop-shop capability will “*include the managing of issuers’ share registers; facilitating communication between issuers and their shareholders; analysing issuers’ shareholdings; assisting issuers with corporate actions*”.¹³

- [22] Link SA cited as its rationale for the transaction the belief that it will benefit from acquisition by a local entity. The JSE is expected to “*bring about strategic growth through, for example, the introduction of new products, services, efficiencies, cutting-edge technology and best practices*”.¹⁴ The seller intends to focus on developing and investing in its business in other jurisdictions.

THE RELEVANT MARKETS AND COMPETITION ASSESSMENT

- [23] There was broad agreement on the definition of the relevant markets between the parties. We have found no reason to deviate from the market definitions as presented by the Commission and merging parties in the hearing following a meeting of their respective economic experts, defined as follows:

[23.1] National market for licensed equity/stock exchanges (consisting of listing and trading of equities);

[23.2] National market for transfer secretarial and registry services (“TS services”);
and

[23.3] National market for CSDP services.

- [24] As such, we focus in particular on characterising the nature of competition in each relevant market, which provides the basis for our analysis of the theories of harm in the sections to follow.

¹² Merger Report, para 8.

¹³ Merger Report, para 8.

¹⁴ Merger Report, para 9.

National market for licensed equity exchanges (listing and trading of equities)

Market definition

- [25] The JSE was the only licensed exchange in the market for securities exchanges in South Africa until recently when four new exchanges entered the market, namely; A2X Markets (“A2X”), ZAR X (Pty) Ltd (“ZAR X”), Equity Express Securities Exchange (Pty) Ltd (“EESSE”) and 4 Africa Exchange (Pty) Ltd (“4AX”).¹⁵ These new exchanges focus on secondary listings, listing for small caps and B-BBEE-restricted, listed securities.
- [26] As stated above, the JSE operates various platforms for listing and trading of different asset classes including equities, bonds and derivatives. These securities constitute separate markets that differ with regard to the time taken to settle a trade on them and this is why they belong to different trading platforms and settlement and clearing systems.¹⁶ Moreover, an exchange that only has a license to list and trade equities cannot deal in other types of securities without prior approval from the FSCA to include other securities in its license. This suggests that there is a separate market for each security or asset class.
- [27] The Commission considered the market for equity exchanges which includes the listing and trading of equities. The equity market is further delineated into the primary market where new shares are issued by a company looking to raise capital and the secondary markets where previously issued shares are resold. All the South African exchanges operate both primary and secondary markets except for A2X.

¹⁵ Since 2016, four rival exchanges have been granted licences.

¹⁶ Merger Report, para 62.

Nature of competition in the national market for licensed equity exchanges

- [28] The Commission found that the JSE currently holds in excess of 99% of the number of trades of listed equities in the upstream market for stock exchanges in South Africa. The JSE's competitors in this market collectively held less than 5% market share in terms of number of trades, and less than 5% of the market share in terms of total revenues of equity exchanges in South Africa in 2018.¹⁷ The new exchanges have collectively attracted less than 50 listings to their equity boards compared to the JSE's 312 listings as of 2019. It is accepted by all parties that the JSE is dominant in the exchange market.¹⁸
- [29] The barriers to entry in this market are high and include large costs, the lengthy time to register an exchange (EESE speaks of an 18-month licensing process), the limited size of the South African equity and debt markets, and the prevailing exchange license costs.¹⁹ It is understood that the new entrants that entered the market in the last five years remain small and focus on secondary listing, listing for small caps and B-BBEE-restricted, listed securities.
- [30] This market is also capital intensive, EESE submits that approximately R 1 million initial capital was required to start-up the exchange.²⁰ In addition, the market is characterised by network effects which have contributed to the slow growth and expansion as new and small exchanges find it challenging to attract entities to list on a new stock exchange with no track record. There are also challenges to growth owing to the lengthy and burdensome switching processes for clients.

¹⁷ Merger Report, para 92.

¹⁸ Expert Report prepared by Genesis Analytics "Malherbe WS", para 22 (Bundle A, p.386) and Merger Report, para 106.

¹⁹ Merger Report, para 107.

²⁰ Merger Report, para 107.

CSDP market

Market definition

- [31] The Commission defined a broad downstream market for CSDP services in South Africa. This definition included all of the six “bank CSDPs” – Absa, FirstRand Bank, Nedbank, Standard Bank, Standard Chartered Bank, and Citibank – and the two non-bank CSDPs operated by Computershare and LIS referred to as “non-bank CSDPs”. The bank CSDPs are also licensed for bonds and money markets, while the licenses granted to the non-bank CSDPs are only for equities.
- [32] The bulk of the equities’ CSDP market is comprised of institutional investors (such as asset managers, investment houses, and brokers). Only the non-bank CSDPs are active in supplying equities CSDP services to the retail shareholders of issuers.
- [33] CSDPs are the only authorised agents to have an account and interact with Strate. Strate operates as a clearing house by facilitating the settlement of buy-and-sell transactions and safekeeping of securities, recording changes in ownership for the licensed equities exchanges in South Africa, and ensuring the reconciliation of participant accounts. It is also a self-regulating organisation (“SRO”), like the JSE, as it issues and enforces rules and requirements, practice notes and directives for the purposes of, among other things: (i) ensuring that participation in Strate is limited to suitable entities; (ii) prescribing the types of accounts that may be held in CSDPs; (iii) prescribing the types of accounts CSDPs may hold in Strate; (iv) prescribing security measures and internal and external controls that CSDPs must uphold.²¹
- [34] CSDPs hold accounts, and directly interact, with Strate. The services offered by CSDPs are required by issuers, brokers and investors to maintain an

²¹ Witness Statement of Barend Paul Van Der Westhuizen “van der Westhuizen WS” (Bundle A, p.214).

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electronic record of shares and facilitate the settlement of trades; as well as, vote by proxy. CSDPs enable the clearing and settling of trades entered into by their clients. They ensure that clients have the securities being sold and the funds to pay for the securities. CSDPs are responsible for delivering securities and reconciling the electronic securities sub-registers reflecting the ownership of securities; and, in due course, reporting that information to Strate.

- [35] The services offered by CSDPs are therefore distinct from those provided by other financial market participants and constitute a separate relevant market for the provision of CSDP services in South Africa.

Nature of competition in the national market for CSDP services

- [36] Link held less than 1% market share in the CSDP market based on assets under custody in South Africa and approximately 4% based on revenue generated as at September 2019.²² The largest CSDPs are banks, RMB (FirstRand) and Standard Bank with national market shares of approximately 40-50% and 40-50% based on revenue generated, respectively.
- [37] The barriers to entry and expansion in this market are high due to the high initial capital outlay, long set up time and stringent regulatory requirements. Initial outlay costs include adequate systems infrastructure, meeting information security standards and ensuring adequate operational capacity (including office space) which can amount to a capital outlay of approximately R 250 million.²³ In addition, market participants must invest heavily in technology in order to keep up with the latest technology and new market developments. There has not been entry for the last six years.

²² Merger Report, paras 95 and 97.

²³ Merger Report, Bundle A, para 112.

TS services market

Market definition

- [38] Transfer secretarial and registry services broadly include (i) registry maintenance; (ii) corporate actions; (iii) reporting and analytics; and (iv) meeting management.
- [39] Section 50 of the Companies Act requires all companies to maintain a register of its shareholders and update the register with any changes. Companies can choose to perform these functions internally, although this obligation can become onerous on a company when its shares are freely traded on an exchange. Providers of TS services are typically appointed by issuers to provide these services.
- [40] In addition to maintaining issuers' share registers, transfer secretaries offer issuers other services such as organising annual general meetings, facilitating dividend payments as well as communicating and managing other corporate actions.²⁴
- [41] There are four transfer secretaries currently active in the TS services market, namely Link SA, Computershare, 4AX and Singular. All of these entities serve listed and unlisted companies. The TS services market is dominated by Computershare, the largest transfer secretary with a national market share of above 70% of issuer clients in South Africa in 2019.²⁵ Link SA is the second largest entity with a market share of approximately 20% of issuer clients in 2019, followed by the other players, who share the remaining 6% of the market.
- [42] Link operates in both the CSDP and TS services markets. There are competitive advantages in being able to offer this combination of services as a "one-stop-shop" to issuer clients and Link charges a single fee for these

²⁴ Merger Report, para 43.

²⁵ Merger Report, para 99.

services.²⁶ Computershare also operates in both markets. However, the services offered by participants in each market are functionally differentiated and complementary, noting also that the functions of CSDPs are regulated by Strate, while those of TS service providers are not. We do not deviate from the definition of a separate relevant market for the provision of TS services (and another for CSDPs) as agreed to by the economic experts.

Nature of competition in the TS services market

- [43] Link entered the TS services market in South Africa in 2006 through acquiring Ultra, one of two transfer secretaries at the time. The remainder of the TS services providers entered the market after 2006. Singular entered in 2012 and 4AX around 2014.²⁷ Other than the entry of 4AX and Singular, there have not been any major changes to the structure of the market, and Computershare has remained the largest player in the market since the mid-2000s.
- [44] The market for the provision of TS services in South Africa is relatively small, concentrated and mostly commoditised. The lack of significant shifts in the market shares of the different players in the market is due to various factors relating to how issuers come to engage providers of TS services.
- [45] Issuers generally choose a provider of TS services when they wish to list on an exchange for the first time and/or when they come to the end of their existing contract with a service provider.²⁸ They may also be approached directly by a service provider through its marketing activities. As such, the appointment of a transfer secretary may be based on recommendations made by a sponsor²⁹ or based on proposals received directly from transfer secretaries (unsolicited or in response to a Request for Proposals – RFP).

²⁶ Merging Parties Heads of Argument, para 48.

²⁷ Terbium (previously branded as Trifecta), which also offered TS services, exited the market in 2019 following allegations of corporate misconduct. Merging Parties Heads of Argument, para 79.

²⁸ Tribunal Transcript of Proceedings IM141Dec19 “Transcript”, p.655-657.

²⁹ Sponsors are exchange-approved service providers that assist issuers to comply with listings requirements, including transactions support and documentation requirements.

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- [46] We understand from the evidence that the decision to appoint a transfer secretary is a process typically involving (i) receiving a proposal; (ii) a presentation by the TS services provider; (iii) an evaluation by the issuer that takes into account factors such as the capacity of the company, credentials, systems, compliance and risk, expertise, and its B-BBEE rating; (iv) references from service providers' clients; and (v) negotiations on fee structure or pricing. Issuers usually use company secretaries, procurement departments, or corporate law firms that handle the company's listing process.³⁰
- [47] Brand is an important factor considered by issuers and sponsors in selecting a TS services provider, although it is not the only factor. The evidence shows that personal relationships with company secretaries and sponsors are important for obtaining an opportunity to make a proposal, but track record, price and quality are determinative of winning a contract.³¹ In this regard, there was evidence that sponsors usually suggest two names to issuers wanting to list: Link SA and Computershare.³²
- [48] Once a transfer secretary is chosen, large issuers typically conclude fixed term contracts with transfer secretaries³³, whereas smaller issuers tend to agree to evergreen contracts which can be terminated with a notice period of up to six months.³⁴
- [49] Information about a forthcoming new listing is not generally known to TS service providers. Sponsors may advise the company that is preparing to list regarding the requirements to appoint a transfer secretary, and make recommendations in this regard. As such, the sponsors play a critical role in determining which TS service providers are presented to the company that is preparing to list, usually through its company secretary. To this end, Mr Hanif stated that during

³⁰ Transcript p.660-662; Malherbe (Exhibit A, slide 26).

³¹ Malherbe (Exhibit A, slide 26); Hanif WS, para 26; Transcript p.875, lines 11 to 13 (van der Westhuizen).

³² Malherbe (Exhibit A, slide 26). Witness Statement of Jacques De Bie "De Bie WS", para 14 (Bundle A, p.186).

³³ Transcript p.762, lines 9 to 14 (Hanif).

³⁴ Transcript p.771, lines 6 to 19 (Hanif).

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the listing process, competition between transfer secretaries for issuer custom is usually limited to only those on the recommendations list of the sponsor.³⁵

[50] Once the transfer secretary has been appointed, it works closely with the issuer and builds a relationship. Transfer secretaries are infrequently replaced, and there is stickiness of customers, evidenced also in the lack of significant changes in the market shares of the two main players.³⁶ In the five years up to 2019, only [REDACTED] clients have switched their TS services provider.³⁷

[51] [REDACTED]
[REDACTED]
[REDACTED]³⁸ Given a new entrant's limited experience in handling large complex accounts, issuers are unlikely to use the services of a new entrant.
[REDACTED]
[REDACTED]
[REDACTED]³⁹

[52] The Commission and the intervenor raised various concerns regarding the proposed merger in the TS services market, as well as the equity exchanges and CSDP markets identified above. Analysis of the various theories of harm in relation to these markets as well as the remedies put forward is set out below.

ANALYSIS

[53] The majority of the competition concerns raised related to potential outcomes in the markets for TS services, and for CSDP services, both of which are markets in which Link has a presence. For an issuer to be listed, to maintain its listing on the JSE's platform, and to meet legal governance requirements and facilitate trade in their equities, issuers are required in terms of the JSE's listings requirements to have custodial and settlement services as well as

³⁵ De Bie WS, paras 14-16.

³⁶ Malherbe (Exhibit A, slide 10).

³⁷ Merger Report, para 125.

³⁸ De Bie WS, para 14.

³⁹ De Bie WS, paras 14 and 25.

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transfer secretarial and registry services. Link SA offers various services that are mandatory to issuers. The JSE provides and maintains the platform on which issuers are listed.

[54] We note from the outset that the merger is assessed as one in which the services offered by Link are consumed in a complementary manner with listing and trading of equities. That is, with respect to the TS services market, the services are complementary rather than in a vertical relationship with the JSE's licensed function offered to issuers. The same is true of CSDP services, which means that the transaction is evaluated in terms of the relevant theories of conglomerate merger analysis.

[55] In terms of economic theory, conglomerate mergers rarely have anti-competitive effects and are often pro-competitive. In instances where harm is alleged to flow from such mergers, it is for the Tribunal to consider both pro- and anti-competitive effects.⁴⁰

[56] The Commission's case for prohibition of the proposed transaction relied on two broad theories of harm tied to JSE's market power in the exchange market. The first theory of harm is the soft leveraging of JSE's relationships, together with its strong brand, with its issuers and sponsors in the exchange market to gain market share for Link SA in the TS services market. The second theory of harm advanced by the Commission related to regulatory abuse. It argued that the JSE will have the incentive to manipulate its regulatory functions to favour those issuers listed on its exchange that also appoint Link as their TS services provider.

[57] Computershare raised additional, overlapping theories of harm, stating that this merger is likely to result in the foreclosure of Link's rivals in the TS services and CSDP markets through the JSE leveraging its dominant position in the exchange market. Computershare outlined various mechanisms such as price, regulation, access to data and first mover advantages that may be used by the

⁴⁰ EC Guidelines on the Assessment of Non-horizontal Mergers, paras 91-92.

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merging parties to foreclose rivals. In addition, Computershare also raised a theory of harm impacting the JSE's rivals in the exchange market, whereby the merged entity directs trade activity only to the JSE.

[58] The merging parties contested the theories of harm raised by both the Commission and Computershare. To the extent that there were likely concerns, their view was that the revised conditions tendered on 10 August 2020 would appropriately address the concerns.

[59] We analyse each of the potential competition concerns thematically in terms of the markets in which the foreclosure effects are expected to arise. The analysis focuses on the remedies put forward and how these, considered together, alleviate any potential competition concerns that could arise from this merger. Overall, we are satisfied that the conditions sufficiently address any likely anti-competitive effects of the merger.

Foreclosure in the exchange market

[60] The Commission and Computershare raised concerns that post-merger, Link might be able to direct the trading activities of retail investors in its CSDP accounts to the JSE rather than to other exchanges resulting in the foreclosure of other exchanges.

[61] The concern raised by Computershare related to the ability of the JSE to leverage the retail shareholder base of Link to offer data analytics and value-added services using aggregated retail investor details with trading data generated on the JSE's exchange. The concern is that this would incline issuers towards being listed on the JSE exchange and having their nominee accounts administered by Link.

[62] We find that the concerns raised are unlikely to materialise in the foreseeable future and that the mechanism by which retail investors and/or brokers could be directed to only trade on the JSE is unclear. In addition, any flows of information between the JSE and LIS that would be critical for such a theory to pertain are sufficiently restricted by the remedies that prevent the JSE from

sharing with Link any information obtained in the performance of its regulatory functions, as discussed below.

Analysis of potential foreclosure in the equity exchanges market

[63] Link has the largest number of retail shareholders, the largest issuer-sponsor nominee account (Old Mutual), and administers the issuer-sponsored nominee accounts of Sasol, and BEE schemes of Vodacom and Sasol.⁴¹ These activities attribute a large number of retail shareholders to Link - if the retail investors in Link's accounts were to trade on any of the other exchanges, this would constitute a large portion of those exchanges' activities. In terms of potential foreclosure of rivals, Computershare argued that the large number of retail investors provides a good starting base for the JSE to initiate active retail trading on its exchange, primarily through directing LIS retail investors to trade on the JSE. Furthermore, it is alleged that the parties could use data analytics combining LIS retail investor data with JSE's trading data to present an offering that would incline issuers towards being listed on the JSE exchange and having their nominee accounts administered by Link, to the disadvantage of the JSE's rivals.

[64] We have considered that the trading volumes represented by retail investors in Link's CSDP accounts are less than 1% (by volume and value) of retail and total equities trading in South Africa.⁴² Even if the volume and value of retail trading were to grow substantially in the coming years, this is likely to remain a relatively small proportion of the market in our view. Computershare admits that this is partly a future concern. It states that there are "*currently no retail brokers on A2X ... and the issuer bases of the other exchanges are currently too small for retail shareholders to want to use the CSDP's (sic) deal routing system to trade shares on the alternative exchanges*".⁴³

⁴¹ Computershare Heads of Argument, paras 121-123.

⁴² Merging Parties Heads of Argument, para 291.

⁴³ Computershare Heads of Argument, para 115.

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- [65] Most importantly, there is little evidence that LIS would be able to direct its retail investor base, represented by appointed brokers, to only execute trades on the JSE. We understand that the brokers, who are sophisticated participants in financial markets, have the primary discretion in terms of where to direct trades and it is not clear how the merged entity would have the ability to compel brokers to invest on the JSE. In any event, the durable and high market shares of the JSE suggest that the inclination of brokers to execute trades primarily on the JSE, regardless of which CSDP they work with, pre-dates the merger.
- [66] To the extent that data analytics using the aggregated data sets of both the JSE and LIS could be used to present an offering to brokers that would incentivise them to trade only or primarily on the JSE, the remedies put forward address this concern by preventing such flows of information. Specifically, in terms of the conditions, the JSE is prevented from providing any information that it obtains in the course of the performance of its Regulatory Functions to Link. This includes information about issuers and/or sponsors, or transactions, corporate actions or other activities of issuers and sponsors.
- [67] This restriction, that prevents the flow of certain information between JSE and Link, includes BDA data generated on the JSE's exchange.⁴⁴ As such, we are satisfied that any anti-competitive effects anticipated by this theory of harm are likely to be limited and/or sufficiently mitigated by the remedies.

Foreclosure in the CSDP market

- [68] Strate is the only CSD in relation to equities trades in South Africa, and it authorises and regulates the six CSDPs including LIS.⁴⁵ Of issue in this transaction is the fact that the JSE has 44.56% shareholding in Strate, with the five other (bank) shareholders each having less than 15% shareholding in Strate. There are two primary concerns emanating from the JSE's role as a shareholder in Strate:

⁴⁴ Transcript, p.1176.

⁴⁵ Granite Central Securities Depository (Pty) Ltd ("Granite") is licensed to operate as a CSD for over the counter bonds and derivatives trades.

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- [69] It was argued that the JSE might use its shareholding in Strate to access competitively sensitive information about rival CSDPs for the benefit of LIS.
- [70] In the instance that it can be said that the JSE controls Strate, for the purposes of a competition evaluation, a merger between the JSE and Link could create incentives for the JSE to utilise its control over Strate and/or regulatory leverage to foreclose LIS's rivals in the CSDP market.
- [71] We deal first with the concern about the JSE's shareholding in Strate being used to access and use rival CSDP information to benefit Link.
- [72] The merging parties have argued that it is not possible for the JSE to access such information through its role in Strate for various reasons. First, the Strate board has delegated its regulatory and supervisory obligations to the Supervisory and Regulatory Committee, and the JSE does not have any representation on this Committee.⁴⁶ Second, there are no reporting links between the JSE and Strate.⁴⁷ Third, Strate's role as the regulator of CSDPs is kept separate from the rest of its commercial operations, and strict information barriers have been put in place to ensure this.
- [73] Notwithstanding their view that there is no mechanism by which the JSE could access competitively sensitive information about Link's CSDP rivals, the merging parties put forward remedies to address any potential for such information to be availed to the JSE through its participation in the governance structures of Strate.
- [74] We find that the remedies put forward are sufficient to address any potential competition concerns in this regard. In terms of these remedies, the JSE is prevented from using its shareholding in Strate to directly or otherwise influence the manner in which Strate fulfils its regulatory functions, which entails

⁴⁶ Witness Statement of Dr Leila Fourie "Fourie WS", para 78.3 (Bundle A, p.163).

⁴⁷ Fourie WS, para 78.5.

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regulating the activities of CSDPs. This undertaking has already been made to the FSCA in terms of the FMA.⁴⁸

- [75] The remedies preclude the participation of any JSE representatives in Strate's key structures for the supervision or regulation of CSDPs, including: the Strate Regulatory and Supervisory Committee, the Supervision Division of Strate, the Participant Market Failure Committee, an Urgent Issues Committee or any similar committee of the Strate board that is established in respect of a CSDP that is authorised by Strate. Preventing the participation of the JSE's representatives in these structures serves to restrict the potential for sensitive information to flow to LIS via the JSE. The relevance of these committees and structures is as follows:
- [76] Strate has a Regulatory and Supervisory Committee that deals with the enforcement of Strate rules and directives. The JSE is not represented on this committee, although the JSE's Director of Market Regulation is sometimes invited to the meetings of this committee. This individual is excused when information is discussed in these meetings that would present a conflict for them.
- [77] Strate's day-to-day regulation is done by its Supervision Division responsible for surveillance and enforcement of Strate rules and directives, and monitoring CSDP compliance.
- [78] When there are enquiries into whether a CSDP is conducting business in a manner that is detrimental to the rights and interests, business or operations of other participants, clients, issuers or Strate, the Strate rules make provision for *ad hoc* Participant Failure Committees and Urgent Issues Committees.⁴⁹ In the event that such an ad hoc committee is convened, in respect of LIS, there may be a conflict. The tendered conditions include an undertaking by the JSE to ensure that it is not represented on such a committee and would, in the unlikely

⁴⁸ Merging Parties Heads of Argument, para 331.

⁴⁹ Letter from Mr Cockeran (JSE Legal Counsel) dated 19 June 2019, to Mr Boyd and Mr Keetse of FSCA (Bundle B, p.422-425).

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event where the JSE is appointed to the committee, either decline appointment or recuse its representatives from any deliberations that could or might be perceived to result in a conflict of interest.

[79] Preventing the JSE from participating in the identified structures also serves the additional function of preventing the JSE post-merger from participating in (some) governance structures of Strate in which strategic and/or regulatory decisions about rival CSDPs would be taken. The latter speaks to the second concern as stated above, relating to the potential for regulatory leverage and/or abuse by the JSE of its position to shape the strategy of Strate in favour of the merger entity and, importantly, to the detriment of rival CSDPs.

[80] This then brings us to the issue of control. Computershare submits that the JSE controls Strate by virtue of being the single largest shareholder, and the fact that Dr Fourie, JSE's CEO, is one of the members of the Strate board and the Strate board chairperson, Mr Nigel Payne, is a former JSE director.⁵⁰

[81] On the other hand, the merging parties argued that the JSE does not control Strate because its interest does not confer control over Strate or its operations. The JSE has only two representatives on the board of Strate, out of a total of 12 directors (however, the board may range from between 6 and 15 directors). As voting on the board is per director, the merging parties assert that the JSE cannot exercise any form of control through the board. The merging parties also argue that they have no ability to control Strate because any attempt to do so would be unlawful. Strate regulates CSDPs in line with the FMA and the Strate Rules.⁵¹

[82] In our view, it is significant that the JSE is able to block any special resolution of Strate. The matters reserved for special resolution⁵² include:

⁵⁰ Van Der Westhuizen WS para 117.

⁵¹ Fourie WS, para 78.3.

⁵² Memorandum of Incorporation of Strate clauses 4.10.3 (Bundle C, p.833).

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- [82.1] Change in the focus or nature of the business;
 - [82.2] Budgets;
 - [82.3] Capitalisation of profits;
 - [82.4] The appointment or removal of the CEO;
 - [82.5] Approval of whom the Directors may make an offer of Sale of Equity;
 - [82.6] Determination of trust agreement terms;
 - [82.7] Approval of funding requirements; and
 - [82.8] Proposal of any resolution under section 164(2) of the Companies Act.
- [83] In our view there is no need to make a finding on whether the JSE's interest in Strate amounts to control. This is because any mechanism of regulatory abuse, and the likely effects thereof, are likely to be addressed by the remedies put forward, as well as other mitigating factors which make it unlikely that the JSE could abuse its position at Strate to the detriment of competition in the CSDP market.
- [84] In this regard, it is significant that representatives of the other bank CSDPs also serve on the board of Strate. The bank CSDPs are sophisticated participants in the financial markets ecosystem and are likely to have the incentive to act together as members of the board of Strate to undermine any attempts by the JSE to favour LIS over their own businesses.
- [85] During the Commission's investigation of this matter, it was the bank CSDPs that were especially vocal about potential conflicts of interest that could arise through this merger. This suggests to us that these entities are vigilant and alive to any risk of regulatory abuse or leveraging, and we consider it likely that they would raise any merger-specific concerns, if they were to arise despite the remedies that have been put in place, either with the FSCA or the Commission. It is for the same reason that we believe that the banks are well positioned to act as an additional monitoring mechanism in the market in terms of the adherence of the merging parties to the agreed conditions.

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- [86] An example of the type of conflict that may arise was provided by Computershare during the Commission's investigation. It argued that Link's proximity to Strate and JSE would assist it to have first mover advantages (through regulation) on new rules, requirements, systems and processes.⁵³ However, assuming it were possible for the JSE to access information that has to do with regulatory decisions of Strate, it is difficult to see how new rules or systems emanating from Strate, for example, may be implemented or actioned by LIS without the other CSDPs being aware, or without the cooperation of other CSDPs and Strate to the extent that Strate systems need to be interoperable,⁵⁴ or how Link could jump ahead in responding to expected regulatory changes while the other CSDPs that are privy to the same information could not.
- [87] To the extent that it was possible for LIS to benefit from sensitive information emanating from Strate's regulatory functions or otherwise, such as on forthcoming regulatory changes, we find it likely that the other CSDPs as competitors in the market would respond with their own strategies to the extent that such sensitive information affected a parameter of competition in the CSDP market. Specifically, LIS is the smallest CSDP in terms of custody holdings in 2019, and the second smallest (with 4% share) in terms of revenue generated (only Computershare is smaller, with a █% share).⁵⁵ The two leading players have shares above 40% in terms of revenue generated. That is, as a late entrant, the competitive significance of LIS in the CSDP market is still small and it is unlikely to be able to exert significant competitive pressure on the other CSDPs – if it did, this is likely to be a pro-competitive outcome in a highly concentrated market.
- [88] The regulatory environment in the South African and international financial markets is characterised by high reputational and legal risks for non-compliance by market participants. Any attempt by the JSE to abuse its position or unlawfully gain an advantage for Link is likely to result in significant

⁵³ Merger Report, para 148.1.

⁵⁴ Computershare Heads of Argument, para 62.1.

⁵⁵ Merger Report, para 95.

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scrutiny of and reputational harm for it. It is also likely that the FSCA would intervene directly if such a concern were to arise, more so in relation to the CSDP market and Strate, as a key market infrastructure (compared to any conduct affecting the TS services market which is not provided for in the FMA).

[89] Notably, the JSE made an undertaking with the FSCA and in the remedies put forward in this transaction that it will not attempt to use its shareholding in Strate to influence the manner in which it regulates LIS and other CSDPs. We find this undertaking, along with the additional factors such as the role of the FSCA and other CSDPs, to be sufficient to mitigate any likely concerns regarding the JSE's ability to use its influence over Strate to foreclose rivals of LIS in the CSDP market. The alertness of the other CSDPs to potential conflicts of interests (including first-mover advantages offered to Link such as data access or beta-testing or interoperability), as raised during the Commission's investigation, provides a further monitoring mechanism to ensure compliance by the merging parties with the remedies.

Foreclosure in the TS services market

[90] The various mechanisms through which it is alleged that foreclosure of rivals in the TS services market could occur include soft leveraging and non-price mechanisms, tying and bundling, first-mover advantages, regulatory leverage, and data access theories of harm. In assessing the likelihood of a substantial lessening of competition in the TS services market our determination ultimately turns on two important issues. First, the nature and state of competition in the TS services market and expectations of rivalry if the status quo prevails. Second, whether the merger conditions put forward by the merging parties address any potential mechanism through which the merging parties could substantially prevent or lessen competition in the TS services market. We consider each of the main theories of harm, focusing in particular on the mechanisms through which anti-competitive effects could arise and the remedies put forward to address this.

Soft leveraging

- [91] The Commission submitted that the JSE will leverage its strong brand and relationships with issuers and sponsors to gain market share for Link SA in the TS services market. Post-merger, the JSE would continue to have interaction with issuers in two different capacities. The first is the exchange relationship that the JSE has with sponsors and issuers. The second is the service provider-customer relationship it has with its sponsors and issuers, whereby the JSE provides its ancillary commercial services to issuers. Under the second relationship, the JSE engages issuers as customers and markets its commercial services to them. The Commission's view is that the JSE has substantially more opportunities to engage with issuers and cross-sell products than Link SA's rivals who do not enjoy these opportunities.⁵⁶
- [92] The Commission argued that given that the JSE brand is inseparable, there is no kind of behavioural remedy that could ameliorate the opportunities for leveraging by the JSE of its image as an exchange and the functions it performs in that capacity and the JSE's commercial services offerings. Dr Fourie also attested to this stating in her testimony that the JSE brand is indivisible and cannot be distanced from other divisions.⁵⁷
- [93] The Commission added that this theory of harm does not rely on an abuse of the JSE's exchange relationships, but rather on the issuers and sponsors' perception of being able to attain goodwill and/or compliance with the JSE in its exchange capacity by virtue of choosing to employ the JSE's commercial offerings (that post-merger would include Link's TS services). Similarly, Computershare argued that influence, promotion, marketing, recommendation, leverage of the JSE brand, and perceptions of quality and compliance associated with the JSE's unique position, all enable the JSE to foreclose competition in the TS services market.⁵⁸ The Commission is of the view that

⁵⁶ Govinda (Exhibit C, slide 15).

⁵⁷ Transcript p.589.

⁵⁸ Smith (Exhibit B, slide 22).

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there is no legal regulation in the FMA outlawing these forms of soft leveraging strategies.

[94] The JSE's intention to use its relationships with issuers and sponsors, together with its brand in order to grow Link's market share is contained in the JSE's strategic documents.⁵⁹ In terms of its incentive to engage in this behaviour, the Commission argued that the JSE estimated Link's revenue at approximately █% of its total revenue, a significant increase from the pre-merger contribution of its commercial services.⁶⁰ This potential increase in revenue establishes the incentive for the JSE to grow Link's revenue through the alleged leveraging. We note that while the gains are small in the context of the total revenues of the JSE, the increase in revenue is significant in the context of a market in which revenues at the exchange level have been stagnant or declining.

[95] With respect to the effects of soft leveraging behaviour, the Commission is concerned that other TS services providers do not have access to or could not possibly replicate (and thus leverage) the JSE's market power or influence in the equities exchange market. The association with the JSE that Link would enjoy is considered together with other elements such as combined prices and other merits that could be offered by the merged entity, however, the Commission argued that soft leveraging can still outweigh the other considerations. The effect would be a lessening of competition by marginalising or excluding smaller transfer secretaries such as Singular and preventing potential competition by further raising barriers to entry in the TS services market.

[96] The merging parties argued that the influence, promotion, marketing, recommendation, and soft leveraging of the JSE brand are benefits that should be regarded as pro-competitive. Only in circumstances where they provide the merged firm with an advantage so significant that it cannot be countered by rivals should these benefits be viewed as anti-competitive in nature.⁶¹

⁵⁹ Transcript p.513.

⁶⁰ Merging Parties Heads of Argument, para 196.

⁶¹ Malherbe WS, para 130.

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- [97] Our view is informed by the historical market structure and dynamics of competition in this market. These same characteristics, as assessed below, are relevant also for the other theories of harm relating to the TS services market.
- [98] It is important to recall that in this market Computershare has consistently held a market share of above 70% based on its share of the number of issuers in the market. The last significant shift in these market shares occurred in the early-2000s through aggressive competition from Ultra which was ultimately acquired by Link.⁶² Ultimately, only two competitors have had a significant presence and growth in the TS services market, and post-merger there will still be a duopolistic market structure.
- [99] While market shares are not necessarily determinative in any competition analysis, it is significant that Computershare has been and remains dominant in the market. Notably, it has maintained this position in spite of Link having built up its capabilities and reputation over time in order to compete more aggressively with Computershare over the past five years. It is common cause that Link has won a handful of issuer clients from Computershare in this recent period. At the same time, Computershare has won clients back from and against Link. The question that arises is whether this attrition at the margin in terms of clients, is evidence of vibrant competition in the counterfactual (as argued by Mr Smith) or a sign of a lack of meaningful rivalry given that the overall share held by Computershare has not changed significantly in this period.
- [100] Two other aspects of the market are relevant here, being price competition and quality of service. First, there is evidence that Computershare has had to respond to Link's attempts to win its clients through aggressive pricing and negotiation. Link's fees are significantly lower than those of Computershare in certain instances, and Computershare had to [REDACTED]

⁶² Malherbe (Exhibit A, slide 10).

[REDACTED]

That is, the price competition from Link has led to the competitive response from Computershare.

[101] This evidence indicates that there is some competition in the market between Link and Computershare, at least for larger customers. To the extent that rivals such as Link and Singular are able to approach clients with a better price proposition or service offering, and Computershare responds with its own improved offer, there is a form of competitive discipline present. The fact that customers tend not to switch does not mean that the competitive process is not working. In a market in which competition works on the basis of price bids to provide a relatively commoditised service, price competition does seem to be happening and is likely to continue. The question is one of degree – the prevailing price competition, including for the custom of some of South Africa’s largest issuers, is clearly only at the margin and accounts for a very small proportion of the overall market.

[102] Second, Computershare’s internal documents reveal that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]⁶⁵ In a competition analysis, evidence of this nature is consistent with a market in which there is a lack of intense rivalry.

[103] The merging parties say that the market is ripe for an increase in competition offered by Link.⁶⁶ We are inclined to agree with this. The question is whether Link would be able to compete more intensely with the dominant incumbent,

⁶³ Malherbe (Exhibit A, slide 12).

⁶⁴ Transcript p.973.

⁶⁵ Computershare Multi-Year Plan (Bundle D, p.1531).

⁶⁶ Malherbe (Exhibit A, various).

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Computershare, if it has the additional resources and brand power of the JSE. This must be balanced against any potential anti-competitive effects resulting from the proposed merger in the TS services market, including it raising barriers to entry and potential effects on small market participants.

[104]

[REDACTED]

[REDACTED]⁶⁷ Based on what has happened before when Link has tried to acquire Computershare's clients, it is likely that a better-resourced Link could tip the scales in terms of intensifying competition with Computershare in the TS services market. It is also important to recall that historically the most significant shifts in market shares, and indeed the establishment of the market positions of both Link and Computershare, have arisen due to acquisitions.

[105]

In the proceedings, we did not have the benefit of evidence from issuers themselves as the group that stands to benefit the most from the competition in the TS services market, but also the most likely to be harmed by unilateral conduct by the merger entity in that market. However, it is clear in this transaction that there are likely to be some pro-competitive benefits accruing ultimately to customers (issuers) through more intense competition between the merged entity and Computershare. It is unlikely that Computershare, as a well-resourced market participant with a well-known international brand itself, would be completely foreclosed or that it would not be able to respond with its own innovation, an improved service offering and through price competition as it has already demonstrated.

[106]

Specific concerns were raised by the Commission and Computershare about the ability of smaller TS services providers, such as Singular, to compete with Link SA in the TS market post-merger. The evidence was that Singular currently only has [REDACTED] issuer clients.⁶⁸ We are concerned about potential

⁶⁷ Transcript, p.677.
⁶⁸ De Bie WS, para 30.

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increased barriers for small players and future competition in the TS services market. However, we note that small players have entered as ‘niche’ players in the market, and they can, through building relationships and reputation, still expand albeit at a substantially smaller scale than the two leading rivals.

[107] The conditions prevent the merged entity from leveraging the JSE’s regulatory functions to benefit Link over other TS service providers. Specifically, the remedies prevent the JSE, in the performance of its regulatory functions, from marketing, promoting or otherwise incentivising issuers or sponsors to make use of the services of Link, including through inducing or favouring issuers or sponsors that make use of Link’s services. The remedies also explicitly require the JSE to notify prospective and current issuers that it is prohibited from requiring or incentivising issuers or sponsors to only use Link’s services post-merger. They go a step further, and here to the benefit of the smaller TS providers, by requiring the JSE to publish on its website and its JSE Quarterly the names and contact details of rival providers of TS services at the request of such providers.

[108] These provisions imply that rivals such as Computershare and Singular can still compete for clients, and they would not be prevented or undermined through the regulations from doing so. The provisions mean that the JSE and Link will still be required to compete on the merits to win clients, which is a pro-competitive outcome as explained above. Various pricing and tying and bundling strategies that the merged entity could employ to secure clients are also restricted in terms of the remedies, as discussed below.

Regulatory abuse or leveraging

[109] The second theory of harm advanced by the Commission entails the JSE using its regulatory powers to advance the TS and CSDP services offered by Link over those of its rivals.

[110] Linked to the issue of the JSE’s regulatory role in the market, is the various forms of information about market participants that the JSE has access to. It is

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alleged that the merged entity may also abuse its access to confidential information in two ways.

- [111] Firstly, the JSE may use confidential information pertaining to broker clients contained in its BDA system for the purposes of benefiting Link's TS services business.
- [112] Secondly, the JSE might use its shareholding in Strate to access competitively sensitive information about rival CSDPs for the benefit of LIS.
- [113] Similar to the Commission's theory of regulatory abuse, Computershare submits that JSE's regulatory power enables it to foreclose and increase barriers to entry and expansion in two ways.
- [114] The first means is to misuse or abuse its regulatory power that may be done through anything as explicit as putting in Listings Requirements explicitly for Link's benefit or applying different sanctions to issuers who use Link as opposed to other TS service providers. However, Computershare submits that this is not its central concern,⁶⁹ and so we do not focus on it in these reasons.
- [115] The second means of using its regulatory power is more nuanced. The JSE has discretion in respect of the application and enforcement of its regulatory powers, which could have the direct or ancillary effect on JSE's avenues for financial gain, and resultant higher barriers to entry and expansion for other stakeholders, and its rivals.⁷⁰
- [116] The Companies Act and the JSE Listings Requirements give rise to and shape the primary work of providers of TS services. The FMA outlines what listings requirements must prescribe, however there is significant latitude granted to the exchange to determine its listings requirements. This latitude is tempered with oversight by the FSCA and through mandatory public consultation to

⁶⁹ Computershare Heads of Argument, para 60.2.

⁷⁰ Smith WS, paras 91 to para 101.2.1.

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determine any changes in the requirements.⁷¹ For the reasons set out below, we do not find that the JSE would have the ability to leverage its dominance as an exchange to benefit Link SA through amending its Listings Requirements. The merger conditions mandate a distinction from a competition perspective between the JSE's commercial and regulatory functions which mitigates further concerns.

- [117] As set out in the regulatory framework and in the merging parties' submissions, the JSE is under legal duty to avoid any conflict of interest between its regulatory functions and commercial services in terms of section 62 of the FMA. The Conflict of Interest Policy ("COI Policy") flags any amendments to the Listings Requirements as an "identified conflict" and has a process set out to ensure that any amendment to the Listings Requirements is approved by either the SRO Committee of the JSE or the FSCA.⁷²
- [118] The merging parties argued that the JSE does hold in high esteem its awarded status as a competitive capital market on which to list when seeking to invest globally. We agree that this global investment setting provides significant incentive for the JSE not to be involved in any allegations of capture, and that there are significant disincentives for the JSE to abuse its regulatory position, including the significant reputational harm that would likely arise.
- [119] The only practical way that the Listings Requirements could be amended or applied in order to benefit Link SA is if an issuer was (i) required as a result of the Listings Requirements to appoint Link SA as the issuer's transfer secretary; or (ii) given some benefit (or suffered some disadvantage) if it appointed (or did not appoint) Link SA as its transfer secretary. We agree that such regulatory abuse is not likely and would be detectable in the market, because amendments to the requirements are subject to the JSE's own public consultation process through which stakeholders would be able to raise their concerns, as well as being subject to the FSCA's own public consultation process in terms of section

⁷¹ LR Section 1: Authority of the JSE and Paragraphs 1.31 and 1.32 of the JSE's listings requirements.

⁷² Issuer Regulation Conflicts of Interest Policy, clause B1 (Bundle B, p.370-371).

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11(6) of the FMA. Furthermore, the remedies put forward in this transaction prevent the JSE from using regulatory powers or giving special benefits to firms that appoint Link SA as their transfer secretary, and there are explicit reporting requirements in the remedies requiring the JSE to provide information to the Commission on an annual basis demonstrating compliance with the merger conditions.

[120] With regards to the JSE's use of confidential BDA information to benefit Link SA, the merging parties submitted that this is a system used by brokers that keeps the securities records and books of brokers in respect of their clients, and all their securities trading and related cash and securities movements. The BDA system is also used by the JSE to ensure that brokers comply with their obligations recorded in the JSE's Equities Rules dealing with the clearing and settlement of transactions concluded on the JSE's equities market. The JSE only has access to the BDA information for the purposes of carrying out its regulatory functions – the information contained in the BDA is proprietary information of the brokers.⁷³ The JSE's use of the BDA information is accordingly limited to activities such as ensuring that transactions are cleared and settled, ensuring assets are segregated, and ensuring that brokers meet capital adequacy requirements.⁷⁴

[121] Section 73 of the FMA prohibits the JSE and its employees from disclosing confidential information, obtained in the performance of their functions under the FMA, to any other person.⁷⁵ JSE officers and employees are also prohibited from disclosing such confidential information internally (within divisions of the JSE).

Tying and bundling

[122] Computershare argued that the merged entity may engage in tying and bundling between the licensed functions of the JSE and the TS and CSDP

⁷³ Fourie WS, para 31 and Merging Parties Heads of Argument, para 240.

⁷⁴ Malherbe WS, para 150.

⁷⁵ Merging Parties Heads of Argument, para 242.

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services offered by Link SA and LIS. The concern raised was that the JSE could, through its regulatory functions, influence or require issuers seeking to list on the JSE to also purchase Link's TS or CSDP services.

[123] Alternatively, the JSE might offer listings services on favourable terms to issuers that also use Link's TS or CSDP services. As the JSE is dominant in the exchange market, the Commission and Computershare submit that such conduct would make it difficult for rivals of Link in the TS and/or CSDP market to compete effectively.

[124] The merging parties rebut these arguments by stating that the JSE would not have the ability or the incentive to engage in any tying or bundling conduct and gave two main reasons to support their submissions.

[125] First, the JSE is prohibited in terms of the FMA from tying and/or bundling its licensed functions with any ancillary commercial services, and the JSE would have no incentive to breach the FMA in that regard given the very severe legal and reputational consequences that such conduct would have for its core exchange business and role as a regulator.⁷⁶ Dr Fourie explained in her testimony that this conduct would amount to breaches of the JSE's duties in terms of sections 10(1) and 62 of the FMA which require the JSE to conduct its business as a licensed exchange "*in a fair and transparent manner, with due regard to the rights of authorised users and their clients*"; and its obligation to manage possible conflicts of interest between its regulatory functions and its commercial services.⁷⁷ Moreover, Dr Fourie pointed out that, in terms of section 60 of the FMA, the FSCA has the power to cancel or suspend the JSE's exchange license if it fails to comply with any of its duties under the FMA.

[126] Second, the merging parties have offered conditions in which they undertake not to engage in any such tying or bundling conduct. The remedy in this regard states that the JSE shall not engage in any bundling and/or tying of products

⁷⁶ Fourie WS, paras 71-72 and Transcript p.126, line 19 – p.128, line 1 (Fourie).

⁷⁷ Fourie WS, paras 68-70 and Transcript p.126, line 8 – p.128, line 1 (Fourie).

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and/or services related to its Licensed Functions (as an exchange) with any of the services offered by Link, including incentive strategies that would require, influence or induce firms making use, or wishing to make use, of the Licensed Functions offered by the JSE to also make use of all or any of the services offered by Link (in both the TS services and CSDP markets).

Digital post-boxes

- [127] There was a final issue raised by Computershare which pertained to a JSE initiative to move to a system of digital post-boxes. In broad terms, the initiative is aimed at addressing a challenge in the industry with communicating with retail shareholders. In the hearing, a point of discussion was whether the JSE would make this facility available to all providers of TS services, rather than only to Link post-merger.
- [128] There was no theory of harm advanced in this regard. The JSE has nonetheless made an undertaking to make the post-box services available, upon request, to any provider of TS services on terms no less favourable than those on which it provides such post-box services to Link.
- [129] As this matter does not relate to a specific theory of harm, we have not addressed it any further in these reasons.

CONCLUSION

[130] For all the above reasons, we are satisfied with the proposed conditions and are of the view that they are appropriate and sufficiently address any potential competition concerns raised by the proposed transaction. We accordingly approved the proposed transaction subject to the conditions attached in the Annexure “A” hereto.

Signed by: Thando Vilakazi
Signed at: 2021-06-14 17:05:24 +02:00
Reason: Witnessing Thando Vilakazi

Thando Vilakazi

Dr Thando Vilakazi

25 May 2021

Date

Ms Yasmin Carrim and Mr Andreas Wessels concurring.

Tribunal case managers:	Mpumelelo Tshabalala, Ndumiso Ndlovu and Camilla Mathonsi
Tribunal economist:	Lumkisa Jordaan
For the Commission:	Layne Quilliam and Neelofah Ally
For the Merger Parties:	Adv Jerome Wilson SC <i>assisted</i> by Adv Kerry Williams <i>instructed</i> Webber Wentzel <i>on behalf of</i> JSE (Acquirer); and Bowmans <i>on behalf of</i> Link (Target)
For the Intervenor:	Adv Robin Pearse SC <i>assisted</i> by Adv Claire Avidon <i>instructed</i> by Cliffe Dekker Hofmeyr