



COMPETITION TRIBUNAL OF SOUTH AFRICA

Case no: LM106Sep22

In the large merger between:

Manta Bidco Limited

Primary Acquiring Firms

and

Mediclinic International Plc

Primary Target Firm

Panel	:	J Wilson (Presiding Member)
	:	I Valodia (Tribunal Member)
	:	F Tregenna (Tribunal Member)
Heard on	:	15 March 2023
Last Submission Received	:	22 March 2023
Reasons issued on	:	19 June 2023

REASONS FOR DECISION

Introduction

- [1] On 23 March 2023, the Competition Tribunal (“Tribunal”) conditionally approved the proposed acquisition by Manta Bidco Limited (“Bidco”) of the entire issued share capital of Mediclinic International Plc (“Mediclinic”). The reasons for the Commission’s decision are set out below.

Parties to the Proposed Transaction

- [2] The primary acquiring firm is Bidco, a company duly incorporated under the laws of England and Wales. Bidco is a 50/50 joint venture which is jointly controlled by Remgro

Healthcare Holdings (Pty) Ltd (“RHH”) and SAS Shipping Agencies Services S.à.r.l. (“SAS”).

- [3] RHH is a company duly incorporated under the laws of South Africa. RHH is ultimately wholly owned by Remgro Limited (“Remgro”). Remgro is publicly listed on the Johannesburg Stock Exchange Limited (“JSE”) and is not directly or indirectly controlled by any single firm or individual. Remgro, together with all the companies directly and indirectly controlled by it, is referred to below as the “Remgro Group”.
- [4] SAS is a company duly incorporated under the laws of the Grand Duchy of Luxembourg. SAS is an indirect subsidiary of MSC Mediterranean Shipping Company S.A. (“MSC”), a company duly incorporated under the laws of Switzerland. MSC is in turn wholly owned by MSC Mediterranean Shipping Company Holding S.A. (“MSC Holding”), a company also duly incorporated under the laws of Switzerland. In South Africa, MSC Holding indirectly controls various companies. MSC Holding, together with all the companies directly and indirectly controlled by it, is referred to below as the “MSC Group”.
- [5] The Remgro Group and the MSC Group are collectively referred to as the “Consortium”.
- [6] The primary target firm, Mediclinic, is a company duly incorporated under the laws of the United Kingdom (“UK”). Mediclinic has a primary listing on the London Stock Exchange and a secondary listing on the JSE and the Namibian Stock Exchange. Mediclinic’s shares are widely held, and no single firm or individual directly or indirectly controls it. Mediclinic controls several firms, comprised mostly of hospitals, in various areas including Jersey, the UK, the Netherlands, Luxembourg and Southern Africa. Relevant to the proposed transaction is that Mediclinic wholly owns Mediclinic Southern Africa (Pty) Limited (“MSA”). MSA controls and operates various hospitals, mental health facilities and day-care clinics across South Africa and Namibia.

Activities of the parties

- [7] Bidco is a newly incorporated joint venture entity for purposes of the proposed transaction.
- [8] Remgro is a diversified investment holding company which holds investments in the healthcare, customer products, financial services, infrastructure, industrial and media industries.
- [9] MSC is a global provider of maritime transport and containerised liner shipping services. In South Africa, MSC provides container liner shipping services, general cargo/break-

bulk transport services, as well as Roll-on Roll-off shipping services, logistics services and inland transportation services.

- [10] Mediclinic is a diversified international private healthcare services group, with divisions in Switzerland, Southern Africa and the Middle East. Mediclinic's Southern Africa division includes 50 hospitals, five sub-acute hospitals, two mental health facilities and 14 day-care clinics across South Africa and Namibia.

Transaction and Rationale

- [11] In terms of a Scheme of Arrangement under Part 26 of the UK Companies Act, Bidco will acquire the entire issued ordinary share capital of Mediclinic, other than the Mediclinic shares already owned by certain Remgro subsidiaries, namely RHH, Remgro Health Ltd and Remgro Jersey (Pty) Ltd (representing approximately 44.56% of Mediclinic's issued ordinary share capital).

- [12] The shares held by the above Remgro subsidiaries will be acquired pursuant to a Subscription and Rollover Agreement in terms of which:

12.1. The relevant Remgro subsidiaries have agreed to sell their 44.56% shareholding in Mediclinic to Bidco in exchange for shares in Bidco; and

12.2. RHH and SAS have agreed to fund Bidco by way of equity to enable Bidco to satisfy the cash consideration payable to the holders of the issued ordinary share capital of Mediclinic prior to the implementation of the proposed transaction.

- [13] Post-merger, Mediclinic will be ultimately indirectly jointly controlled by Remgro and MSC through Bidco. Mediclinic will be delisted from the London, Johannesburg and Namibian Stock Exchanges.

- [14] The merging parties submitted the following regarding the Consortium's rationale for the proposed merger:

"Remgro has high regard for Mediclinic's management and operations and wishes to support Mediclinic's long-term growth ambition to further develop existing operations and expand into new geographies. Remgro believes evolution in Mediclinic's ownership structure towards a long-term, sustainable construct, alongside a closely aligned partner, is important in realising Mediclinic's full potential."

Remgro and MSC are strongly aligned in their common desire to invest for the long term in South Africa and the private healthcare sector. The Consortium members also share a deep appreciation for the importance of access to high-quality healthcare and the corresponding positive societal impact.

The Consortium believes that significant, long-term investment is required to realise the potential of Mediclinic's network of hospitals, clinics, and other facilities, and to drive continued growth for the benefit of all stakeholders across the continuum of care. Furthermore, the Consortium believes that private ownership will better enable the management team to focus on and execute their strategic vision for the business, supported by a closely aligned shareholder group, away from the requirements of the public markets, particularly in light of operating, regulatory and macro-economic uncertainty. Private ownership will better support Mediclinic by providing greater flexibility to capitalise on growth opportunities in existing and new markets in a more agile manner.

Remgro recognises the significant benefits of a partner with a shared long-term investment horizon, with the resources available to support the ongoing investment in the business. MSC, as a container shipping company and private cruise operator, brings extensive experience in operating a global business. The Consortium believes Mediclinic will be able both to utilise its partners' expertise as it seeks to continue to grow and expand its geographical footprint. Remgro and MSC, therefore, believe that private ownership, under the Consortium's stewardship, will significantly benefit all stakeholders, including Mediclinic's patients, employees, doctors, host governments and wider Southern African, Swiss and Middle Eastern stakeholders".

[15] The merging parties submitted the following as Mediclinic's rationale for the merger:

"The proposed transaction represents a near-term value realisation for Mediclinic's shareholders at an attractive premium.

Consortium ownership will allow Mediclinic to grow and continue to serve its customers through a broad range of high-quality healthcare services. The

global connectivity that a partnership with MSC provides, and the Consortium's other stated intentions for the business, management, employees, pension schemes and other stakeholders of Mediclinic are also important factors that have guided the proposed transaction. Quality healthcare is critical for a country's growth and development. In South Africa, private healthcare providers play an important role in this regard. With shareholders like SAS and Remgro, that can continue to invest in South Africa, Mediclinic can continue and grow the positive impact it makes for the benefit of all South Africans."

The Commission's competition assessment

Incentives analysis

- [16] The Competition Commission ("Commission") found that there is no horizontal overlap between the activities of the merging parties as MSC is not active in the provision of private healthcare services. Therefore, the proposed transaction does not result in any market share accretion. Rather, the proposed transaction involves an existing shareholder (Remgro) increasing its effective shareholding in Mediclinic from 44.56% to 50% through Bidco, and MSC (a shipping company) also acquiring a 50% effective interest in Mediclinic through Bidco.
- [17] The Commission considered whether the proposed merger is likely to result in a change in the strategic and operational direction of Mediclinic.
- [18] In this regard, the Commission found that, pre-merger, Remgro's 44.56% stake in Mediclinic entitles it to appoint 3 members to the board of directors of Mediclinic, which is the holding company of MSA. However, the appointment of the third director is subject to the requirement that the board has a majority of independent directors. Remgro has in fact appointed only one member to the board of Mediclinic, which is currently comprised of 12 directors (8 of which are independent directors). The Commission found that Remgro's current shareholding in Mediclinic does not vest it with any control of Mediclinic.
- [19] As regards the post-merger position, the merging parties submitted that, for as long as Remgro and SAS hold equal percentage shareholdings (currently 50% each) in Bidco, they may each nominate 3 directors for appointment to the board of directors of Bidco (with no independent directors).

- [20] Having regard to the rights enjoyed by Remgro and SAS in Bidco, the Commission found that they will both acquire joint control of Mediclinic through Bidco.
- [21] The Commission also noted the merging parties' submission that Remgro has adopted a philosophy of decentralised management, which means that its subsidiaries have autonomous boards of directors and management structures. The merging parties submitted further that the acquisition of control of the Mediclinic group will not adversely affect its management and operations, as the Consortium attaches great value to the skills, experience and commitment of the existing management and employees of Mediclinic, and will rely on them to deliver its vision to grow the business in both existing and new locations.
- [22] Having regard to the above, the Commission found that the proposed merger is unlikely to result in any change in incentives in respect of the operations and strategic direction of MSA.

Third party competition concerns

- [23] During its investigation, the Commission received submissions from a group of academics from the University of the Witwatersrand and the University of Cape Town regarding the proposed merger (the "Concerned Academics")¹. These concerns related to Remgro's multiple investments in the health sector in South Africa, including its interest in Mediclinic as well as its alleged interests in Discovery Holdings Ltd ("Discovery"), Momentum Metropolitan Holdings ("MMH") and Community Investment Holdings (Pty) Ltd ("CIH"), which in turn has an interest in the Afrocentric group of companies. All of the latter companies are involved on the funder side of the South African private healthcare sector.
- [24] The Concerned Academics' concerns are discussed in more detail below. In essence, they contend that, in the context of Remgro's investments in both the funder and provider segments of the South African healthcare industry, the proposed merger raises both horizontal and vertical concerns that are ultimately likely to result in higher costs being incurred in relation to the provision of private healthcare services in South Africa.
- [25] The merging parties disputed the facts on which the Concerned Academics' concerns were based, and also argued that they were not merger-specific.

Remgro's shareholdings in healthcare activities

¹ Prof. (adj) Alex van den Heever, Prof. Jonathan Klaaren, Prof. Sharon Fonn and Dr Max Price.

- [26] The Commission investigated Remgro's interests in Discovery and MMH and found that, pursuant to an unbundling exercise conducted in 2022, they are now significantly lower (7.9% in the case of Discovery and 8.2% in the case of MMH) than alleged by the Concerned Academics, with no entitlement to appoint board members in either case.
- [27] As regards Remgro's alleged interest in CIH, the Commission found that Remgro does not have any interest in CIH or the Afrocentric group of companies, but only in CIH's subsidiary Community Investment Ventures Holdings (Pty) Ltd ("CIVH"), which does not have any interests in the South African healthcare sector.
- [28] Remgro also disclosed that it has an indirect interest of 18.5% in the National Healthcare Group ("NHG") through its venture capital business, Invenfin. NHG provides medical scheme administration and managed care services in the private healthcare sector. However, the merging parties submitted that, whilst this shareholding entitles Invenfin to appoint one of 7 directors on the board of NHG, Invenfin does not enjoy any form of control of NHG, and this was confirmed by the Commission.

Information exchange

- [29] The Commission also investigated whether Remgro's shareholdings in Discovery, MMH and NHG might afford it access to competitively sensitive information which could be used by Mediclinic against its rivals.
- [30] The merging parties submitted that Discovery and MMH are listed companies and are also regulated by the Financial Services Conduct Authority ("FSCA"), the Prudential Authority, and the Council for Medical Schemes ("CMS"), and must comply with the Protection of Personal Information Act, 4 of 2013 ("POPIA"). As such, the merging parties submitted that Remgro, as a minority shareholder in Discovery and MMH, only has access to publicly available information of Discovery and MMH.
- [31] As regards NHG, the merging parties submitted that NHG is an accredited healthcare administrator and managed care organisation which is also regulated by the FSCA and the CMS, and must comply with the POPIA. They stated further that, as an indirect passive minority shareholder in NHG, Remgro does not have access to any confidential information of the medical aid schemes that NHG administers or the confidential information of these schemes' members or their dependents. Furthermore, Invenfin's representative on NHG's board is not involved with Mediclinic in any capacity.
- [32] The merging parties argued, in conclusion, that Remgro's interests in Discovery, MMH and NHG are minority interests which do not vest it with any control of any of these

entities, or with access to any competitively-sensitive information that could benefit Mediclinic against its rival healthcare providers.

[33] Based on its investigation, the Commission found that Remgro's interests in Discovery, MMH and NHG do not vest it with any ability or incentive to influence the strategies and operations of any of these firms. The Commission found that the risk of information exchange could not be ruled out, but that there did not currently appear to be mechanisms through which confidential information could be exchanged.

[34] The Commission also contacted various other providers of healthcare services, and none of them raised any concerns regarding the proposed merger.

[35] The Commission accordingly concluded that the proposed transaction is unlikely to lead to a substantial prevention or lessening of competition in the provision of private healthcare services.

Public Interest

Employment

[36] The merging parties submitted that the proposed merger will not have a negative effect on employment because it will not result in any retrenchments in South Africa.

[37] As noted above, the merging parties also submitted that the acquisition of control of the Mediclinic group will not adversely affect the management and operations of Mediclinic, and that the Consortium will rely on the current management and employees of Mediclinic to deliver its vision to grow the business.

[38] The Commission contacted the employee representatives of the merging parties, and they did not raise any concerns regarding the proposed merger.

[39] In addition, the merging parties made a commitment that (i) the merged entity would not retrench any permanent or fixed term contract employees as a result of the proposed transaction for a period of three years from the implementation date of the transaction; and (ii) the aggregate number of Mediclinic employees will be maintained over a five year period from the implementation date.

Promotion of a greater spread of ownership

[40] The merging parties submitted that 15.82% of Remgro's shares are held by historically disadvantaged persons ("HDPs"), whilst, as at 2022, 14.33% of Mediclinic's shares were

held by HDPs. However, the merging parties noted that one of the HDP shareholders, Mpilo 1 NewCo (RF), which held 1% of the shares in Mediclinic, had subsequently disposed of its shares on the open market.

- [41] Based on this information, the Commission found that merger will result in a slight increase in the HDP shareholding in Mediclinic from 14.33% to 15.82%.

Further public interest commitments

- [42] However, the Department of Trade, Industry and Competition (“DTIC”) engaged further with the merging parties to determine the willingness of the merger parties to make additional public interest commitments. Pursuant to engagements with the DTIC and the National Department of Health (“NDoH”), the merging parties tendered the following additional commitments:

42.1. Collaboration with the Public Health Sector

- 42.1.1. Mediclinic will provide support on addressing surgical backlogs in the South African public healthcare sector by performing, with partnering practitioners and specialists, at least 1,000 *pro bono* surgeries at its facilities in South Africa in aggregate over its next 5 financial years commencing on 1 April 2023 (subject to appropriate practitioners and specialists being available to perform the surgeries in line with healthcare practice).

42.2. Doctor Engagement Programme

- 42.2.1. In furtherance of the above undertaking, and in consultation with the NDoH, Mediclinic will implement a programme within its network of hospitals, aimed at engaging doctors and encouraging them to assist with *pro bono* surgeries.

42.3. Skills Development And Corporate Social Responsibility Initiatives

Funding Allocations for Medical Training

- 42.3.1. Mediclinic shall, for its next 3 financial years commencing on 1 April 2023:
- 42.3.1.1. spend at least R22.5 million on medical training at Wits Donald Gordon Medical Centre Pty Ltd (in which Mediclinic has a 49.9% shareholding) in aggregate over the period;

42.3.1.2. sponsor training grants and bursaries for medical training, of not less than R30 million in aggregate over the period, taking into account, *inter alia*, information on individuals in need, to be provided to Mediclinic by the NDoH from time to time; and

42.3.1.3. make donations of not less than R15 million in aggregate over the period to the NDoH Public Health Enhancement Fund or to a similar South African medical training focused institution.

Nurses Training

42.3.2. Mediclinic shall, for its next 5 financial years commencing on 1 April 2023, cover the full annual tuition costs of such number of nursing students that will comprise, in aggregate, no fewer than 1,700 nursing students (counted according to the number of nurses enrolled over the period), at an approximate cost of R80 000 000.

42.4. Enterprise and Supplier Development

42.4.1. In collaboration with the NDoH, Mediclinic shall, during its next 5 financial years commencing on 1 April 2023, spend at least an aggregate total amount of R40 million in the form of grants or loans to support Unjani Clinics² (or similar facilities in underserved communities) in the establishment or upgrading of at least 20 clinics and/or mobile health units aimed at advancing the South African healthcare sector, particularly in underserved areas.

42.5. Procurement

42.5.1. Mediclinic shall in aggregate for its next 5 financial years commencing on 1 April 2023, spend not less than R5 billion on procurement from Black-owned businesses, of which amount Mediclinic shall spend no less than R2.5 billion on procurement from Black-owned exempted micro-enterprises and/or qualifying small enterprises.³ These spend commitments are made on the basis that the goods and services that Mediclinic requires to be procured are available on reasonable, practical and competitive terms that

² Unjani is a network of black women-owned and operated healthcare clinics that provide accessible, affordable, quality healthcare to low-income communities.

³ As defined in the relevant codes of good practice published in terms of the Broad-Based Black Economic Empowerment Act, 53 of 2003, in terms of which Mediclinic's broad-based black economic empowerment score is measured.

comply with regulatory requirements (as applicable) and Mediclinic's reasonable requirements, particularly regarding availability, quantity, quality aligned with market standards, counterparty risk and pricing.

42.6. Capital Expenditure

- 42.6.1. Mediclinic shall, for its next 5 financial years commencing on 1 April 2023, incur no less than R5 billion of capital expenditure in its South African operations.

42.7. Establishment of an Employee Benefit Scheme

- 42.7.1. Within 18 months after the implementation date of the proposed transaction, MSA will establish, for the benefit of qualifying workers⁴, an employee benefit scheme ("EBS") in accordance with specified key design principles.

- 42.7.2. In terms of the EBS, qualifying workers will be entitled to receive a share of the profit after tax produced by or within the MSA, on a no-cost basis, equivalent to the economic benefits that would be due to them in terms of a notional vendor-financed employee share plan holding 5% of the shares in MSA measured on a fully diluted basis.

[43] As regards the EBS, the DTIC had initially requested the merging parties to establish a traditional employee share ownership plan ("ESOP") for the benefit of Mediclinic employees. However, the merging parties had submitted that this was not warranted because, *inter alia*, the proposed merger does not negatively impact on HDPs.

[44] In its recommendation, the Commission noted the following regarding the DTIC's ESOP proposal:

- 44.1. The proposed merger does not significantly alter the market structure, as it merely involves an increase in the effective shareholding of Remgro in Mediclinic from 44.56% to 50%.

- 44.2. On the Commission's calculation, the merger will not have an HDP-dilutive effect, and will in fact result in a small increase in the HDP ownership of Mediclinic.

⁴ Defined as all employees as defined in the Labour Relations Act, 66 of 1995, in the continuous employ of MSA and its subsidiaries and Medical Innovations (Pty) Ltd with more than one year tenure regardless of grade / position, excluding all management employees sharing in a short-term incentive plan.

44.3. The merging parties had agreed to other several public interest commitments which are significant and result in public interest benefits.

[45] Having regard to the above, the Commission concluded that, in the light of the conditions that had been tendered by the merging parties, the proposed merger did not raise any public interest concerns under section 12A(3)(e) or any of the other provisions of section 12A(3) of the Act.

[46] Subsequent to the Commission's recommendation, the merging parties and the DTIC also agreed to the EBS referred to above. It appears that this represented a compromise between the parties' opposing positions on the ESOP proposed by the DTIC. However, the DTIC emphasised at the hearing that its willingness to accept the proposed EBS in this case did not represent a change in its general position to advocate for traditional ESOPs in respect of merger transactions.

The Tribunal hearing

[47] Having regard to the importance of the private healthcare sector in South Africa, the information-sharing risks raised by the Commission, and the horizontal and vertical concerns raised by the Concerned Academics, the Tribunal convened a pre-hearing on 22 February 2023. The pre-hearing was attended by representatives of the Commission and the merging parties, as well as representatives of the DTIC and the Concerned Academics and the Mediclinic employee representative. At the pre-hearing, the Concerned Academics indicated that they wished to further submissions at the merger hearing, and their participation was not opposed by the merging parties.

[48] Subsequent to the pre-hearing, Section 27, a public interest law centre, indicated that it also wished to make submissions at the merger hearing, and its request to do so was not opposed by the merging parties.

[49] The Tribunal therefore permitted the Concerned Academics and Section 27 to make submissions at the merger hearing, which was held on 15 March 2023.

Submissions of the Concerned Academics

[50] At the merger hearing, the Concerned Academics explained that their concerns regarding the proposed merger arose from the scale of the commercial entities involved, and the alleged ability of these entities to shape the strategic context within which competition occurs within the private health sector in South Africa. The Concerned

Academics submitted that the merger needed to be assessed in the context of the Commission's findings in the Health Market Inquiry (HMI) in 2019, and argued, in particular, that:

- 50.1. The overall healthcare market is characterised by an absence of productive forms of competition on both the supply and demand sides of the system.
- 50.2. The private hospital market is highly concentrated, with three hospital groups (one of which is Mediclinic) owning most of the acute care beds.
- 50.3. The phenomenon of "creeping mergers" incrementally undermines competition in the provider market.
- 50.4. The concentrated nature of the hospital market influences tariff negotiations with medical schemes at both the national and local levels.
- 50.5. Hospital groups compete for demand by incentivising specialists to locate at their facilities, and to refer patients for hospital services.
- 50.6. Attracting demand indirectly in this way is made possible by fee-for-service ("FFS") reimbursement.
- 50.7. FFS reimbursement makes medical schemes vulnerable to supplier-induced demand ("SID") which is unrelated to healthcare needs. This benefits specialists and hospital groups, and explains a large part of the systemic cost increases faced by the private health system.
- 50.8. Medical schemes do not have sufficient countervailing market power to materially impact on the competitive dynamics of healthcare providers, and consequently cannot implement alternative reimbursement methods ("ARMs"), such as selective contracting, as an alternative to FFS.
- 50.9. The medical scheme administrator market is highly, and increasingly, concentrated, which renders administrators less sensitive to FFS and SID.
- 50.10. A systemic risk exists for the private healthcare market if corporate group structures are permitted to straddle both the demand and supply sides of the market. The resulting conflicts of interest will severely harm the interests of consumers as problematic vertical coordination will lock out the emergence of alternatives to FFS.

[51] The Concerned Academics proceeded to argue that, within this context, the proposed merger establishes a strategic ownership arrangement which, absent conditions, would have an unfettered ability to make strategic investments in any part of the South African private healthcare system. They note that, apart from Mediclinic, Remgro already has shareholdings in Discovery, MMH and NHG and – whilst they accept (in the light of the updated shareholding information provided by the merger parties) that these latter shareholdings do not currently reflect controlling interests – they argue that there is no limit on the extent to which the Consortium could in the future deepen its relationship with these (and other) firms on the funding and provider sides of the market.

[52] The Concerned Academics argued further that the conflicts of interest and competition risks raised by any such strategic moves would prove harmful to consumers through continued cost increases, the provision of unnecessary care, a reduced quality of medical scheme coverage, and reduced healthcare service quality.

[53] Based on these concerns, the Concerned Academics submitted that any expansion of Remgro's interests should be curtailed by way of merger conditions, which could take the form of a requirement on Remgro:

53.1. to disinvest entirely from the relevant parts of the industry;

53.2. not to further expand its investments in the private healthcare sector; or

53.3. to disclose any proposed change in ownership of its investments in the private healthcare sector so that they can be subjected to evaluation and approval by the competition authorities.

Submissions of Section 27

[54] Section 27 supported the arguments of the Concerned Academics that the proposed merger is likely to result in a more concentrated, and less competitive, private healthcare sector, and to exacerbate the prevalence of SID. It also emphasised that, in terms of section 39(2) of the Constitution, the Act should be interpreted in a manner that would “*promote the spirit, purport and objects of the Bill of Rights*” and referred, in particular, to section 27 of the Constitution, which enshrines the right of access to healthcare services.

- [55] Section 27 also argued that the public interest commitments made by the merger parties were insufficiently specific; unenforceable (insofar as they are dependent on the goodwill of doctors to perform *pro bono* surgeries); and did not outweigh the anti-competitive effects of the proposed merger.

The merger parties' response

- [56] The merger parties strongly disputed the concerns expressed by both the Concerned Academics and Section 27 (referred to collectively below as the “concerned parties” for the sake of convenience). They argued that the facts relied on by the concerned parties (including the relevant findings in the HMI) were incorrect or outdated, and that the concerns they expressed were either not merger-specific or speculative and unsubstantiated.
- [57] The merging parties disputed, in particular, that Mediclinic is a dominant firm in any relevant private hospital market, and that the merger will give rise to any horizontal or vertical co-ordination or change in market structure. They pointed out in this regard that the merger will not create any horizontal overlap, and that Remgro's shareholdings in Discovery, MMH and NHG do not vest it with control over any of those firms. They also disputed the prevalence of FFS and SID; and argued that any SID was caused by the conduct of doctors, not hospital groups.
- [58] As regards the concern raised by the concerned parties regarding future investments by the Consortium, the merger parties argued that this was vague, speculative and also not merger-specific. The merger parties also submitted that the incentive of funders in the private hospital sector is to exercise their countervailing power to resist any unnecessary costs on the part of providers; and that the concerned parties had not demonstrated that the benefit to Remgro's shareholding in Mediclinic from any alleged vertical coordination with funders would outweigh the costs of such conduct for Remgro's shareholdings in Discovery, MMH and NHG. The merging parties also argued that Remgro's ability to act in the manner suggested by the concerned parties would, in any event, be constrained by MSC as a joint controller of Mediclinic post-merger.
- [59] The merger parties therefore concluded that the Commission had been correct in its rejection of the concerns raised by the concerned parties.
- [60] As regards the conditions proposed by the Concerned Academics, the merger parties submitted that these were not only unwarranted, but also discriminatory,

disproportionate and unconstitutional; and that they in any event fell outside the jurisdiction of the Tribunal.

The Tribunal's assessment of the concerns raised by the concerned parties

- [61] In our view, the concerned parties are clearly correct in highlighting the importance of the private healthcare sector from a social and constitutional perspective, and in their submission that careful consideration is accordingly required in respect of any proposed merger in this sector. We also agree that the effects of the present merger must be assessed in the context of the prevailing state of competition in the private healthcare sector.
- [62] In the latter regard, we do not believe that the findings of the Commission in the HMI can be wholly disregarded on the grounds suggested by the merger parties. By the same token, however, we are cognisant that certain developments have taken in the private healthcare sector since the publication of the HMI findings, including the partial unbundling of Remgro's previous shareholdings in entities such as Discovery and MMH. And, more fundamentally, we do not have the necessary factual basis in the present merger to make any positive findings regarding the allegations made by the concerned parties regarding the prevailing state of competition in the private healthcare sector, which did not form part of the Commission's investigation of this merger.
- [63] If we were of the view that it was necessary for us to determine the various factual disputes between the parties regarding the general state of competition in the private healthcare sector, we would have required further investigation of the concerned parties' allegations by the Commission, and further evidence from the concerned parties, the merger parties and perhaps other parties as well. In this case, however, we do not believe this is necessary because the concerned parties do not suggest that the various concerns they have raised regarding the general state of competition in the private healthcare sector are merger-specific. Therefore, all that is necessary, and appropriate, for us to consider is the concerned parties' case as to why the proposed merger would have a negative competition or public interest effect on the *status quo*.
- [64] Turning to this case, the concerned parties do not, as we understand them, suggest that the merger itself will give rise to any horizontal or vertical overlaps. All that will change as a result of the proposed merger is that Remgro and MSC will jointly control Mediclinic with a shareholding of 50% each in Bidco, whereas pre-merger Remgro only had a minority, non-controlling interest of 44.56% in Mediclinic, and MSC did not have any interests at all in the South African healthcare sector. The concerned parties also appear

to accept that, as matters stand, Remgro does not have a controlling interest in Discovery, MMH or NHG; and that Remgro does not have a shareholding in CIH, but only in its subsidiary CIVH, and accordingly does not have any participation in CIH's investment in the Afrocentric group of companies.

- [65] In these circumstances, it is hard to see on what basis the proposed merger could give rise to any horizontal or vertical co-ordination effects as alleged by the concerned parties. However, as we understand the concerned parties' case, it is not the mere acquisition of joint control of Mediclinic that gives rise to these concerns, but rather further strategic investments in the private healthcare sector by Bidco that, they anticipate, will follow the current transaction.
- [66] We have some sympathy for these concerns. We do not regard it as unreasonable for the concerned parties to anticipate that the Consortium, having decided to acquire joint control of Mediclinic through Bidco, might use that as a launchpad to make further investments in the South African healthcare sector in the future. At the same time, however, it is wholly speculative at this stage whether any such investments will in fact take place; and, if so, what form they will take, when they will occur and, critically, whether they will have any negative effects from a competition or public interest perspective. The concerned parties, perhaps understandably, do not have evidence regarding any of these matters; all they say, in effect, is that future strategic investments by the Consortium are likely to occur, and that they are likely, at some point, to have a negative effect on competition and the public interest.
- [67] In our view, however, this concern is an insufficient basis for us to impose any additional conditions on the merger of the sort that the Concerned Academics propose. Absent evidence regarding the nature and timing of any further investments by Bidco, and the effects they might have on competition and the public interest, the findings that the concerned parties ask us to make in this regard would in our view amount, in the words of the Competition Appeal Court, to impermissible "*speculation of the kind that cannot be attributed to any evidential foundation placed before the Tribunal*"⁵.
- [68] This is particularly so in circumstances where, as the Commission and the merger parties pointed out, funders such as Discovery and MMH would have no obvious incentive to participate in the vertical co-ordination postulated by the concerned parties. Ordinarily, their incentive would be to use their countervailing power to resist any

⁵ *Schumann Sasol (SA) (Pty) Ltd v Price's Daelite (Pty) Ltd* (10/CAC/Aug01) [2002] ZACAC 2; [2001-2002] CPLR 84 (CAC) (27 June 2002) at page 15.

unnecessary costs being recovered from them by providers, in order to enable them to remain competitive in the administrator market. The concerned parties did not demonstrate that administrators would benefit from paying higher costs than necessary. The mere fact that Discovery is, according to them, highly profitable, does not show this, as it is equally consistent with Discovery being a successful competitor.

- [69] If, on the other hand, the concerned parties' theory is that the administrators would be persuaded or forced by Remgro to engage in vertical coordination, this would again need to be substantiated. They would, for example, need to explain how Remgro could achieve this without having a controlling stake in these firms, and that it would have an incentive to do so notwithstanding the negative effect that would have on the competitiveness of those firms. However, the concerned parties' case before us is evidentially lacking in all these respects.
- [70] In their submissions before the Tribunal, the concerned parties placed reliance on passages from the HMI findings recommending that the competition authorities should regulate "creeping mergers" (particularly in the private healthcare sector) more robustly under the merger control provisions of the Act.⁶
- [71] However, it does not appear to us that the concept of a "creeping merger" advances the concerned parties' case in the present matter. As we understand it, a "creeping merger" typically refers to a transaction that amounts to a merger, but whose anti-competitive effect is only evident when assessed in the context of other mergers consummated by the acquiring firm. This is captured by section 12A(2)(k) of the Act, which permits the competition authorities to have regard to other mergers engaged in by the merger parties in assessing the competitive effects of the merger under investigation.
- [72] However, there is no suggestion in this case that the effects of the proposed merger need to be appraised in the light of any other recent mergers consummated by Remgro or Mediclinic. The concerned parties' case is rather than we should have regard in our merger assessment to (i) Remgro's (non-controlling) interests in Discovery, MMH and NHG, and (ii) the likely future strategic investments of the Consortium.
- [73] We do not regard the first consideration as reflecting a typical "creeping merger" theory given that the existing investments are non-controlling ones. However, labels aside, it is not controversial that these investments are relevant to the merger assessment,⁷ and

⁶ Competition Commission, *Health Market Inquiry, Final Findings and Recommendations Report*, September 2019, paras 109-124.

⁷ See, e.g., sections 12A(2)(i) and (j) of the Act.

both the Commission and we have considered them in this case. For the reasons set out above, we do not find there to be sufficient evidence before us that, even having regard to these other investments, the proposed merger is likely to lead to negative competition or public interest effects.

[74] As regards the second consideration, if any future investments by the Consortium amount to intermediate or large mergers, they will need to be notified to, and approved by, the competition authorities in due course; and, if they amount to small mergers, the Commission will be entitled to call for their notification in terms of section 13(3) of the Act. When the competition authorities assess any such future mergers, they may well, depending on the timing of those transactions, do so having regard to the present merger in terms of section 12A(2)(k) of the Act. To that extent, the “creeping merger” theory may be applicable, but that is a matter for assessment in the future merger investigation, not in the present one when the nature and effects of such future investments are wholly unknown.

[75] The concerned parties argue that the future investments of the Consortium might not amount to mergers, and therefore will not be subject to regulation by the competition authorities under Chapter 3 of the Act before they take place. We agree, but we do not think that recourse to the notion of a “creeping merger” avoids this difficulty. As with Remgro’s existing non-controlling investments, we do not understand the label of a “creeping merger” to apply to any future non-controlling investments by the Consortium. We have, nevertheless, had regard to the possibility of such investments as part of our forward-looking merger assessment in this case, and have determined, for the reasons set out above, that there is insufficient evidence before us regarding the nature and effect of these future investments to regulate them by way of conditions in the present merger as the concerned parties request.

[76] Indeed, in circumstances where there is no evidence regarding the future investments that Bidco might make, and what their competition and public interest effects would be, the first two conditions proposed by the Concerned Academics (disinvestment and a prohibition on further investments) might well have the unintended consequence of preventing existing and/or further investments by Remgro and Bidco that are pro-competitive in nature.

[77] The third proposed condition (notification of any further investments to the competition authorities for evaluation and approval) potentially avoids this risk, but raises difficulties of its own. If the further investment is an intermediate or large merger, it would have to be notified to the competition authorities for approval anyway; and, if it is a small merger, the Commission may call for its notification in terms of section 13(3) of the Act if, in the

opinion of the Commission, the merger may substantially prevent or lessen competition or cannot be justified on public interest grounds. We do not have any basis to anticipate any such notifications at this stage given the absence of any evidence regarding the nature of any future investments by the Consortium or their possible effects.

[78] Insofar as any future investments by the Consortium do not amount to mergers, the concerned parties are correct that they would not be subject to merger control under Chapter 3 of the Act. By the same token, however, it is unclear to us what jurisdiction the Commission would have to approve any such future investments if they were notified to it under the third proposed condition. In any event, even if we have the power to impose such a condition, we do not believe there is a basis to do so in this case given the absence of any evidence regarding the nature or likely effects of investments in question. As the merging parties pointed out, it would be hugely burdensome to require the merging parties to notify any future non-controlling investment for approval by the competition authorities, and this would also place them at a potentially significant disadvantage to rivals in the market who would not be subject to a similar regulatory constraint.

[79] In conclusion, therefore, we find that (save for the risk of information exchange discussed below) the proposed merger does not raise any competition concerns, and there is no basis for the imposition of any competition conditions on the approval of the merger as proposed by the concerned parties.

Competitively sensitive information

[80] The Commission found in its recommendation that there is a risk of competitively-sensitive information being exchanged between Mediclinic on the one hand, and Discovery, MMH and NHG on the other, given Remgro's investment in all of these entities. However, the Commission concluded that, in the absence of board representation by Remgro at Discovery and MMH, there were limited mechanisms through which such information could be shared.

[81] We agree with the Commission's identification of this risk, which is enhanced by Remgro's acquisition of joint control of Mediclinic, but we do not believe that it only arises at board level. We also note the merger parties' position that the exchange of such information is, in any event, prohibited by various other laws. In the circumstances, we have concluded that it would be appropriate to impose a similar prohibition as a merger condition that would be enforceable under the Act as well. That additional condition is included as clause 10 in the conditions attached to these reasons.

Public interest commitments

- [82] As noted above, the public interest commitments tendered by the merger parties were the product of engagements with the DTIC and the NDoH.
- [83] We agree with the Commission's assessment that the proposed merger does not appear to raise any significant public interest concerns. Given this context, and the positive nature of the public interest commitments in question, our focus is more on ensuring clarity in the meaning of the commitments than on their merger-specificity. Indeed, in this case, we have not been able to determine from the record to what extent certain of the commitments are merger-specific. The merger parties' main argument in this regard is that the merger-specificity of the commitments lies in the fact that they will now be the subject of enforceable merger conditions whereas that would not be the case absent the merger. We would not necessarily be persuaded by such an argument in circumstances where the question of merger-specificity was a matter of greater significance.
- [84] For the same reasons, we are less concerned in the circumstances of this case that certain of the commitments, such as the doctor engagement programme, are partly dependent on factors outside of the control of the merger parties. Similarly, various details of the way in which the EBS will operate have not yet been determined. In other cases, this might impact on the weight we would attribute to such commitments.
- [85] As regards clarity, we directed certain queries to the merging parties at, and subsequent to, the hearing, regarding the meaning of certain of the proposed commitments. Pursuant to those queries, the merging parties revised the wording of the commitments in question, as reflected in the final conditions attached to these reasons. We are willing to approve the merger subject to such conditions.

Conclusion

- [86] We conclude that, save for the risk of information sharing (which is addressed in the conditions we have imposed), the proposed transaction does not raise any competition or public interest concerns. We are nevertheless grateful to the Concerned Academic and Section 27 for their valuable submissions in this regard.
- [87] We therefore approve the transaction subject to the conditions attached as **Annexure "A"** to these reasons.

Jerome Wilson

19 June 2023

Adv. J Wilson SC

Date

Prof. Imraan Valodia and Prof. Fiona Tregenna concurring

Tribunal Case Managers:	Kameel Pancham and Leila Raffee
For the Merging Parties:	Michelle Le Roux SC and Tsakane Marolen instructed by Webber Wentzel, Cliffe Dekker Hofmeyr and Bowmans
For the Commission:	Rakgole Mokolo and Grashum Mutizwa
For the Concerned Academics:	Prof. Jonathan Klaaren, Prof. Alex van den Heever, and Prof. Sharon Fonn
For Section 27:	Khanyisa Mapipa and Boane Twala
For the DTIC:	Nkonzo Hlatshwayo and Phuti Mashalane

CONFIDENTIAL

**ANNEXURE A
MANTA BIDCO LIMITED**

AND

MEDICLINIC INTERNATIONAL PLC

CASE NUMBER: LM106Sep22

CONDITIONS

1. DEFINITIONS

1.1 The following expressions shall bear the meanings assigned to them below, and cognate expressions bear corresponding meanings –

1.1.1 **"Acquiring Firm"** means Bidco;

1.1.2 **"Acquiring Group"** means Bidco and the Consortium;

1.1.3 **"Approval Date"** means the date referred to on the Tribunal's merger clearance certificate (Form CT 10), being the date on which the Merger is approved in terms of the Competition Act;

1.1.4 **"B-BBEE"** means the Broad-Based Black Economic Empowerment as defined in the B-BBEE Act;

1.1.5 **"B-BBEE Act"** means the Broad-Based Black Economic Empowerment Act, 53 of 2003, as amended;

1.1.6 **"Black"** means black people defined in the B-BBEE Act;

1.1.7 **"Black-owned businesses"** means a business that is held as to at least 51% by Black people;

1.1.8 **"Black women-owned business"** means a business that is held as to at least 30% by Black women;

- 1.1.9 **"Codes"** means the relevant codes of good practice published in terms of the B-BBEE Act in terms of which Mediclinic's broad-based black economic empowerment score is measured;
- 1.1.10 **"Commission"** means the Competition Commission of South Africa, a statutory body established in terms of section 19 of the Competition Act;
- 1.1.11 **"Commission Rules"** means the Rules for the Conduct of Proceedings in the Commission;
- 1.1.12 **"Competition Act"** means the Competition Act, 89 of 1998, as amended;
- 1.1.13 **"Competitively Sensitive Information"** means, without limitation, (i) pricing, volume, margin and cost information in relation to particular products, services, clients and/or suppliers, and (ii) information regarding budgets, business plans and business strategies.
- 1.1.14 **"Conditions"** means these conditions;
- 1.1.15 **"Consortium"** means the Relevant Remgro Subsidiaries and SAS;
- 1.1.16 **"Days"** means any calendar day other than a Saturday, a Sunday or an official public holiday in South Africa;
- 1.1.17 **"dtic"** means the Department of Trade, Industry and Competition of South Africa;
- 1.1.18 **"EME"** means exempted micro-enterprise as defined in the Codes;
- 1.1.19 **"Employee Benefit Scheme"** means a profit participation scheme to be established for the benefit of Qualifying Workers pursuant to these Conditions;
- 1.1.20 **"Establishment Period"** means 18 (eighteen) months from the Implementation Date;
- 1.1.21 **"HDP"** means a historically disadvantaged person as defined in the Competition Act;
- 1.1.22 **"Implementation Date"** means the date occurring after the last condition precedent to the transaction is fulfilled or waived, as the case may be, when the Merger is implemented in accordance with its terms;
- 1.1.23 **"Medical Innovations"** means Medical Innovations Proprietary Limited;

- 1.1.24 **"Mediclinic"** means Mediclinic International plc;
- 1.1.25 **"Medical Training"** means training of healthcare and support professionals working in and supporting healthcare service delivery;
- 1.1.26 **"Mediclinic Southern Africa"** means Mediclinic Southern Africa Proprietary Limited;
- 1.1.27 **"Merged Entity"** means Mediclinic subject to the control of the Acquiring Group following the Implementation Date;
- 1.1.28 **"Merger"** means the proposed acquisition by the Acquiring Firm of the entire issued and to be issued ordinary share capital of Mediclinic other than the shares held by the Relevant Remgro Subsidiaries by way of a Scheme of Arrangement under Part 26 of the UK Companies Act, the shares held being held by the Relevant Remgro Subsidiaries to be acquired pursuant to a subscription and rollover agreement;
- 1.1.29 **"Merging Parties"** means the Acquiring Group and Mediclinic;
- 1.1.30 **"Moratorium Period"** means a period of 3 (three) years from the Implementation Date and includes the period between the Approval Date and the Implementation Date;
- 1.1.31 **"NDoH"** means the South African National Department of Health;
- 1.1.32 **"Nurses Training"** means the training of nurses at Mediclinic's accredited nursing training centres;
- 1.1.33 **"QSE"** means a qualifying small enterprise as defined in the Codes;
- 1.1.34 **"Qualifying Workers"** means all Workers in South Africa in the continuous employ of Mediclinic Southern Africa and its subsidiaries and Medical Innovations with more than 1 (one) year tenure regardless of grade / position, excluding all Workers who are management employees sharing in a short term incentive plan;
- 1.1.35 **"Reference ESP"** means the notional employee share plan as more fully described in line item 3 of **Annexure A.1**;
- 1.1.36 **"Relevant Remgro Subsidiaries"** means Remgro Health, RHH and Remgro Jersey;
- 1.1.37 **"Remgro"** means Remgro Limited;

- 1.1.38 **"Remgro Health"** means Remgro Health Limited;
- 1.1.39 **"Remgro Jersey"** means Remgro Jersey GBP Limited;
- 1.1.40 **"RHH"** means Remgro Healthcare Holdings Proprietary Limited;
- 1.1.41 **"SAS"** means SAS Shipping Agencies Services S.à.r.l.;
- 1.1.42 **"South Africa"** means the Republic of South Africa;
- 1.1.43 **"Tribunal"** means the Competition Tribunal of South Africa, a statutory body established in terms of section 26 of the Competition Act;
- 1.1.44 **"Tribunal Rules"** means the Rules for the Conduct of Proceedings in the Tribunal;
- 1.1.45 **"UK Companies Act"** means the Companies Act 2006 of the United Kingdom, as amended from time to time;
- 1.1.46 **"Unjani Clinics"** means Unjani Clinics NPC, a non-profit company (registration number 2014/089277/08) and a registered public benefit organisation (PBO 930047735) established to implement and manage the Unjani Clinic Network;
- 1.1.47 **"WDGMC"** means Wits Donald Gordon Medical Centre Proprietary Limited, a public-private partnership between Mediclinic and Wits University, in respect of which Mediclinic owns a 49.9% shareholding;
- 1.1.48 **"Wits University"** means the University of the Witwatersrand, Johannesburg; and
- 1.1.49 **"Worker"** means an employee as defined in the Labour Relations Act 66 of 1995, as amended.

2. **COLLABORATION WITH THE SOUTH AFRICAN PUBLIC HEALTH SECTOR**

- 2.1 Mediclinic shall provide support on addressing surgical backlogs in the South African public healthcare sector by performing, with partnering practitioners and specialists, at least 1,000 (one thousand) *pro bono* surgeries at its facilities in South Africa in aggregate over its next 5 (five) financial years commencing 1 April 2023 (subject to appropriate practitioners and specialists being available to perform the surgeries in line with healthcare practice).

- 2.2 The manner in which the aforementioned *pro bono* surgeries in clause 2.1. are performed by Mediclinic is contingent on a variety of factors, many of which are not in Mediclinic's control. Notwithstanding, Mediclinic undertakes to consult with the relevant provincial departments of health where Mediclinic has a presence regarding the nature and geographical location of such *pro bono* surgeries. The recommendations timeously made by the NDoH, to the extent reasonably possible, affordable and practical, will be considered in delivering on this condition.
- 2.3 The Merging Parties confirm that the Merger will not negatively impact Mediclinic's collaboration with the South African public healthcare sector. Mediclinic shall continue to collaborate and engage with public healthcare sector stakeholders on the components of a sustainable healthcare system.

3. DOCTOR ENGAGEMENT PROGRAMME

- 3.1 In furtherance of the undertakings set out in clause 2, and in consultation with the NDoH, Mediclinic undertakes to implement a programme within its network of hospitals, aimed at engaging doctors and encouraging them to assist with *pro bono* surgeries.
- 3.2 The Mediclinic Industry Affairs Executive shall manage the aforementioned undertaking in clause 3.1, in collaboration with the Mediclinic existing doctor relationship management team, to ensure that the objectives of this clause are achieved and effectively implemented.

4. SKILLS DEVELOPMENT AND CORPORATE SOCIAL RESPONSIBILITY INITIATIVES

Funding Allocations for Medical Training

- 4.1 Mediclinic shall, for its next 3 (three) financial years commencing 1 April 2023:
- 4.1.1 spend at least R22.5 million (twenty-two million five hundred thousand Rand) on Medical Training at WDGMC in aggregate over the period;
- 4.1.2 sponsor training grants and bursaries for Medical Training, of not less than R30 million (thirty million Rand) in aggregate over the period, taking into account, *inter alia*, information on individuals in need, to be provided timeously to Mediclinic by the NDoH from time to time; and
- 4.1.3 make donations of not less than R15 million (fifteen million Rand) in aggregate over the period to the National Department of Health Public

Health Enhancement Fund or similar South African Medical Training focused institution.

Nurses Training

- 4.2 Mediclinic shall, for its next 5 (five) financial years commencing on 1 April 2023, cover the full annual tuition costs of such number of nursing students that will comprise, when aggregating the number of nursing students whose tuition costs will be covered per annum over the 5 (five) financial year period, no fewer than 1,700 (one thousand seven hundred) nursing students, at an approximate cost of R80 000 000 (eighty million Rand).¹

5. ENTERPRISE AND SUPPLIER DEVELOPMENT: ENHANCING THE SOUTH AFRICAN HEALTHCARE SECTOR

Mediclinic shall, during its next 5 (five) financial years commencing 1 April 2023, spend at least an aggregate total amount of R40 million (forty million Rand) in the form of grants or loans to support Unjani Clinics (or similar facilities in underserved communities) in the establishment or upgrading of at least 20 (twenty) clinics and/or mobile health units in aggregate aimed at advancing the South African healthcare sector, particularly in underserved areas. When selecting such facilities and/or areas, Mediclinic will consider timeous input from the NDoH as to the underserved areas most in need.

6. PROCUREMENT

Mediclinic shall in aggregate for its next 5 (five) financial years commencing 1 April 2023, spend not less than R5 billion (five billion Rand) on procuring from Black-owned businesses, of which amount Mediclinic shall spend no less than R2.5 billion (two point five billion Rand) on procuring from Black-owned EMEs and/or QSEs. These spend commitments are made on the basis that the goods and services that Mediclinic requires to be procured are available on reasonable, practical and competitive terms that comply with regulatory requirements (as applicable) and Mediclinic's reasonable requirements, particularly regarding availability, quantity, quality aligned with market standards, counterparty risk and pricing.

¹ For the avoidance of doubt, where 'S' is students paid for in any year, $(S1 + S2 + S3 + S4 + S5 \geq 1,700)$. [As an illustrative example, 340 students paid for per year will be $(5 \times 340 \Rightarrow 1,700)$, or another illustrative example could be $(240 + 290 + 340 + 390 + 440 \geq 1,700)$].

7. CAPITAL EXPENDITURE

Mediclinic shall, for its next 5 (five) financial years commencing 1 April 2023, incur no less than R5 billion (five billion Rand) of capital expenditure in its South African operations.

8. EMPLOYMENT

8.1 Subject to the provisions of clause 8.2 below, the Merged Entity shall not retrench any permanent or fixed-term contract employees as a result of the Merger ("**Merger-specific retrenchments**") during the Moratorium Period.

8.2 The undertaking provided in paragraph 8.1 above means that no retrenchments will result as a consequence of the implementation of the Merger. For the sake of clarity, Merger-specific retrenchments do not include (i) voluntary retrenchment and/or voluntary separation arrangements; (ii) voluntary early retirement packages; (iii) unreasonable refusals to be redeployed in accordance with the provisions of the Labour Relations Act; (iv) resignations or retirements in the ordinary course of business; (v) retrenchments lawfully effected for operational requirements (for the purposes of the Labour Relations Act) unrelated to the Merger (vi) terminations in the ordinary course of business, including, but not limited to, dismissals as a result of misconduct or poor performance; and (vii) any decision not to renew or extend a contract of a fixed-term third party contract employee or contract with a third party.

9. ESTABLISHMENT OF AN EMPLOYEE BENEFIT SCHEME

9.1 By the end of the Establishment Period, Mediclinic Southern Africa shall be obliged to establish, for the benefit of Qualifying Workers, an Employee Benefit Scheme in accordance with the key design principles set out in **Annexure A.1**.

10. INFORMATION SHARING

10.1 The Merging Parties shall take the following measures to address the risk of information sharing post-Merger:

10.1.1 Any director, employee or representative of Remgro (or any of its subsidiaries) who has or obtains access to Competitively Sensitive Information relating to Mediclinic Southern Africa shall keep such Competitively Sensitive Information confidential, and shall, in particular, not disclose such Competitively Sensitive Information to any director, employee or representative of Discovery Holdings (Pty) Ltd ("Discovery"),

Momentum Metropolitan Holdings Limited ("MMH") or National Healthcare Group (Pty) Ltd ("NHG").

- 10.1.2 Any director, employee or representative of Remgro (or any of its subsidiaries) who has or obtains access to Competitively Sensitive Information relating to Discovery, MMH or NHG shall keep such Competitively Sensitive Information confidential, and, in particular, shall not disclose it to any director, employee or representative of Mediclinic Southern Africa, Mediclinic or Bidco.
- 10.1.3 In the event that, and/or for so long as, a representative of Remgro (or any of its subsidiaries) becomes, or is, a director of Mediclinic Southern Africa, Mediclinic or Bidco, Remgro shall ensure that such person signs a written confidentiality undertaking confirming such person's obligations in terms of clause 10.1.1. above.
- 10.1.4 In the event that, and/or for so long as, a representative of Remgro (or any of its subsidiaries) becomes, or is, a director of Discovery, MMH or NHG, Remgro shall ensure that such person signs a written confidentiality undertaking confirming such person's obligations in terms of clause 10.1.2. above.

11. MONITORING OF COMPLIANCE WITH THE CONDITIONS

- 11.1 The Merged Entity shall inform the Commission in writing of the Implementation Date within 5 (five) Days of the Implementation Date.
- 11.2 The Merged Entity shall, within 30 (thirty) Days of the end of Mediclinic's financial year-end, for its next 5 (five) financial years commencing 1 April 2023, provide to the Commission a report detailing its progress regarding the compliance with the Conditions. This report shall be accompanied by an affidavit attested to by a senior official of the Merged Entity, confirming the report's accuracy.
- 11.3 The Commission may request additional information from the Merging Parties, which the Commission may reasonably deem necessary to monitor the extent of compliance with the Conditions.
- 11.4 Any person who believes that the Merging Parties have not complied with or have acted in breach of the Conditions may approach the Commission with their complaint. If the Commission determines that there has been an apparent

breach by the Merging Parties of these Conditions, the matter shall be dealt with in terms of clause 12 below.

12. VARIATION OF THE CONDITIONS

The Merging Parties or the Commission may at any time, on good cause shown (including any adverse effect on the Merged Entity's financial performance or macroeconomic or political conditions or healthcare or other applicable regulations impacting the Merged Entity's operations, for example, the impact of COVID-19) and on notice to the other, apply to the Tribunal for any of the Conditions to be waived, relaxed, modified or substituted.

13. APPARENT BREACH

If the Merging Parties appear to have breached the Conditions, or if the Commission determines that there has been an apparent breach by the Merging Parties of any of the Conditions, this shall be dealt with in terms of Rule 39 of the Rules for the Conduct of Proceedings in the Commission read together with Rule 37 of the Rules for the Conduct of Proceedings in the Tribunal.

14. GENERAL

All correspondence concerning the Conditions must be submitted to the following e-mail addresses: mergerconditions@compcom.co.za, ministry@thedtic.gov.za and nicholas.crisp@health.gov.za.

ANNEXURE A.1

	Design Principle	Applicable Criteria
1	Structure	○ To be established for the benefit of Qualifying Workers, which provides Qualifying Workers with economic rights associated with the profit after tax produced by, or within, the relevant constituent components of the Mediclinic Southern Africa group and Medical Innovations.
2	Quantum of benefits	○ The economic benefits due to Qualifying Workers in terms of the Employee Benefit Scheme will be, at least, equivalent to the economic benefits due to Qualifying Workers in terms of the Reference ESP, meaning that the net present value of cash flows, less any remaining funding or liabilities ("Net Cash Flows"), due to Qualifying Workers in terms of the Employee Benefit Scheme will or will likely be the same or higher than the Net Cash Flows due to Qualifying Workers in terms of the Reference ESP.
3	Reference ESP	For the purpose of line item 2 above, the Reference ESP is a notional Employee Share Plan which: ○ is established as an evergreen employee share trust for the benefit of Qualifying Workers; ○ acquires and holds shares in Mediclinic Southern Africa as is equal to 5% of the total issued shares in Mediclinic Southern Africa, measured on a fully diluted basis²; and ○ is vendor-financed on market-related terms.
4	Funding of the Employee Benefit Scheme	○ The Employee Benefit Scheme will not have any funding associated with it.
5	Cost to Qualifying Workers	○ The cost to Qualifying Workers will be R 0 (nil / zero Rand).
6	Duration	○ The Employee Benefit Scheme will endure on an evergreen basis. ○ Termination of the Employee Benefit Scheme, for whatever reason, will result in the Employee Benefit Scheme being compensated for the value of the economic benefits forfeited, with such compensation to be held as an asset and used to continue to pay benefits to Qualifying Workers.
7	Participants	○ Qualifying Workers

² The Reference ESP will notionally hold 5% of the total number of shares then in issue, after the issue of new shares to the Reference ESP. For the avoidance of doubt, where total shares prior to Reference ESP is "T" and Reference ESP shares issued is "E" then $(E / (T + E)) = 5\%$. [As an illustrative example, 100 shares prior to Reference ESP with 5.2632 new shares issued will be $(5.2632 / (100 + 5.2632)) = 5\%$].

	Design Principle	Applicable Criteria
8	Benefits	○ Qualifying Workers will be entitled to receive a share of the profit after tax produced by or within the Mediclinic Southern Africa group, or constituent components of the Mediclinic Southern Africa group, on a basis that satisfies the provisions of line item 2 above.