1. During February 2019, the Constitutional Court handed down its decision in the HCI matter, which is anticipated to have a significant effect on the South African merger control regime. The decision dealt with whether the acquisition of more than one half of the issued shares in another firm is a notifiable merger (assuming thresholds are met) in circumstances where an acquisition of de facto control was previously notified to the competition authorities and approved.

2. The crisp question for the Court to decide in HCI was whether the mere fact of HCI's acquisition of the majority (more than 50% but where it was already a significant shareholder) of the issued shares in Tsogo Sun Holdings Limited was sufficient to trigger the merger control provisions of the Competition Act even in circumstances where it was common cause that HCI already exercised sole control over Tsogo as a matter of fact, despite its pre-transaction minority shareholding.

3. HCI had previously sought and received approval for its acquisition of this de facto control over Tsogo in which notification it was expressly noted that HCI intended to acquire the majority of Tsogo's shares in due course. On the facts of this matter, the Court found that HCI's acquisition of additional shares such that it held more than 50% of the issued shares in Tsogo did not constitute an acquisition of control, was not a merger, and therefore did not require prior notification. The Court confirmed the principle that once a party has acquired sole control of another firm, further consolidation of that sole control does not constitute a new merger and therefore does not require approval.

4. The Court's decision raises questions in some respects, including whether its decision means that parties do not have to notify any future transactions that result in the consolidation of control, or if its decision was only restricted to circumstances similar to the facts before it where the initial acquisition of sole control was notified and approved by the competition authorities.

5. The Court stated that "...where the quality of control over the firm which was already controlled changes, it will not constitute a "merger."" It is not clear whether a firm that previously jointly controlled another firm will be exempt from submitting a merger notification if it subsequently acquires sole control of the subordinate firm. The Court accepted the submission that "...where a firm has already acquired control of another firm in terms of any means listed in subsection 12(2) of the Competition Act a transaction need not again be notified simply because the nature of control has changed and now falls within the contemplation of one of the other paragraphs in subsection 12(2)..." which raises similar questions if one accepts that joint control is a species of control listed under section 12(2)(g).

6. A copy of the Constitutional Court's decision is available [here](#).
If you would like to receive more copies of this briefing, or would like to receive Herbert Smith Freehills briefings from other practice areas, or would like to be taken off the distribution lists for such briefings, please email subscribe@hsf.com.

© Herbert Smith Freehills LLP 2020
The contents of this publication, current at the date of publication set out above, are for reference purposes only. They do not constitute legal advice and should not be relied upon as such. Specific legal advice about your specific circumstances should always be sought separately before taking any action based on the information provided herein.