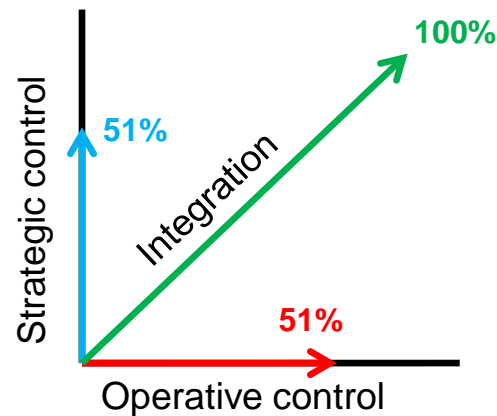




Atsumi & Sakai Janssen

(Foreign Law Joint Enterprise)

New answers to the same old question in M&A:
Majority to Whom? - 100% to Integration!



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“Who gets Majority” – “if we only could have 2x51%!”

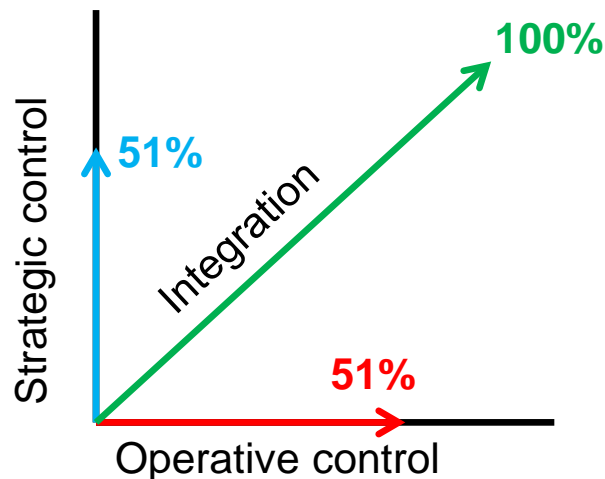
Usual unilateral control and One-Dimensional approach hinders transactions or destroys added value, because

- Unilateral control downgrades the company to be acquired to the status of being a “Target”
- The “Target” and/or its owners must reject or defend against the attack
- A “Target” not fighting back may be a weak partner
- Even if the “Target” accepts 51% for the acquirer, such unilateral control jeopardizes its added value as a partner
- In the worst case, the acquirer ends as Napoleon in Moscow: frozen to defeat
- Post Merger integration can mend, but not prevent damage
- Even worse, if 51% is the all decisive factor, a 50/50 solution is a risky compromise of two losers (who both failed to get the desired 51%) programmed for deadlock

Majority to whom? – to Integration!

Making 2x 51% possible: Multidimensional Governance

- No simple acquisition of “Target” but integration amongst equals
- Integration path determined by PRE-MERGER integration scheme
- Strategic control of acquirer and operative control of partner management are submitted and bound to integration agreed upon equal partners of added value



Majority to whom? – to Integration!

“Multidimensional Governance” – instead of one dimensional control “2x 51%”

- Multidimensional Governance instead of unilateral control:
 - “Integration Path” defined in acquisition agreement granting pre-merger integration of equal partners as well as integrated ownership
 - Management of partner company (“P-Co”) retains operative independence as long as it complies with Integration Path
 - Goal is integrated ownership and mutual profit
 - Acquiring company (“A-Co”) consolidates P-Co and gains fully integrated partner in Asia
- Approach board of directors (or its top) on equal terms
 - Form and modalities of first approach must be carefully prepared



Multidimensional Governance

(sample for private company)

Ownership

- A-Co 51%
- P-Co Family etc. 49%

Voting Rights on Integration Path

- A-Co 51% - α (e.g.2%)
- P-Co Family etc. 49% + α (e.g.2%)

Integration Path

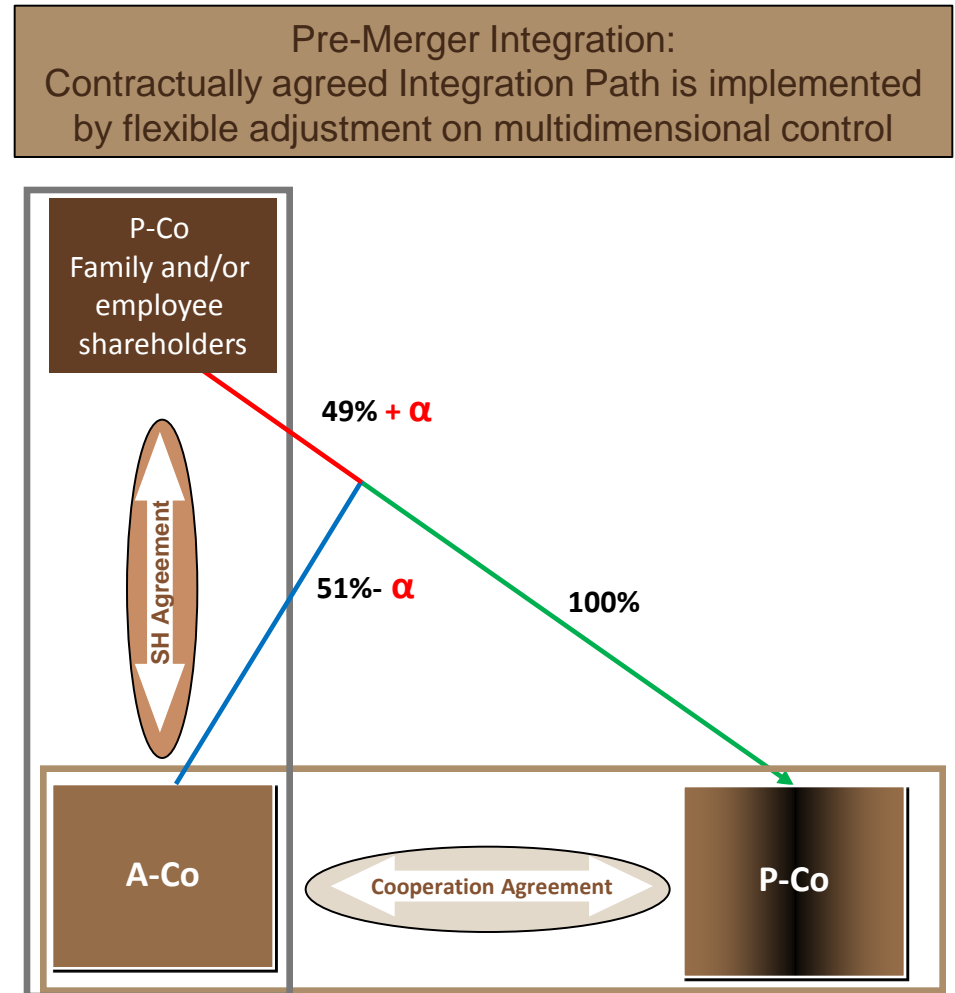
- Processes and objectives for integration of P-Co into A-Co Group defined in the Shareholders` Agreement and the Cooperation Agreement
- Control of integration at eye-level

Operative Management

- In full responsibility of P-Co as long as Integration Path is observed
- In case of deviation “ α ” declines to zero until deviation is corrected

Time frame

- Depending on need of businesses
- Clear time frame is essential to warrant unified ownership





Multidimensional Governance managing Crisis

(sample for private company)

Ownership

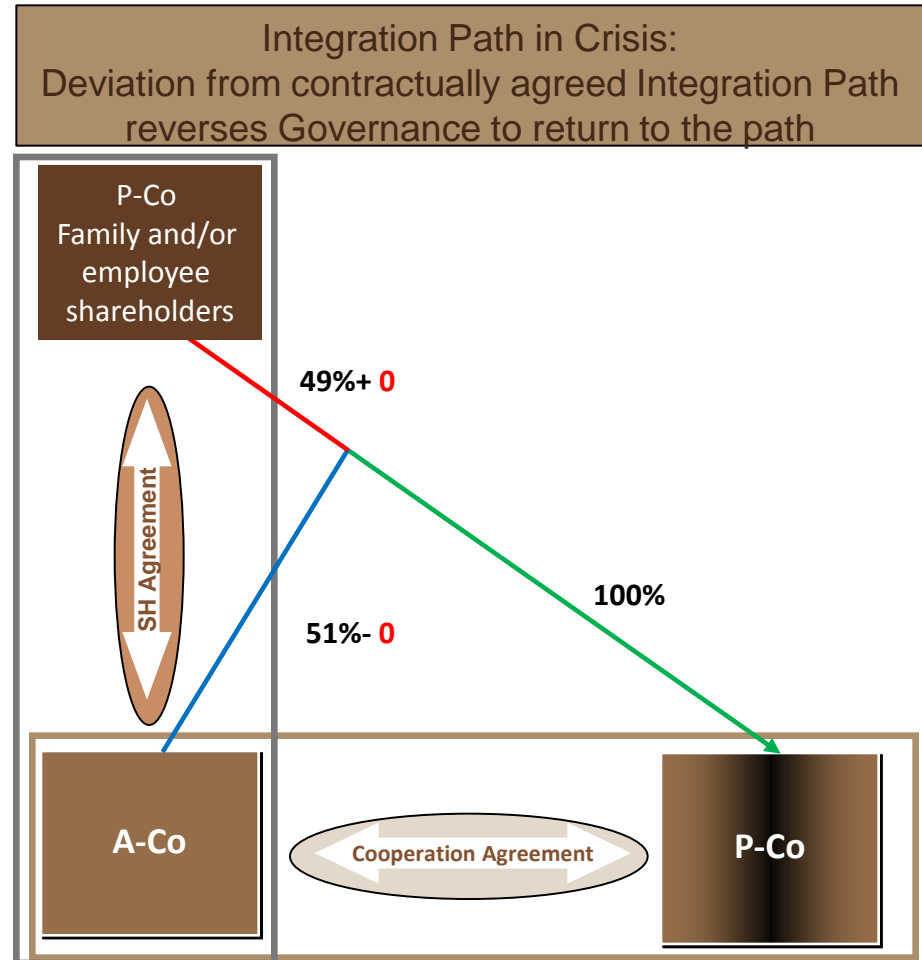
- A-Co 51%
- P-Co Family etc. 49%

Voting Rights in Crisis

- A-Co 51% - **0%**
- P-Co Family etc. 49% + **0%**
- Adjustment by “α” suspended, until integration path is reached again under leadership of A-Co.
- A-Co can use majority according to unadjusted ownership
- A-Co can exchange or appoint additional members of Board of Directors and take control over P-Co`s operative business

Re-establish Governance after correction of deviation

- A-Co is obliged re-establish Multidimensional Governance after crisis is overcome
- After reinstalling implementation of Integration Path α is reestablished and control goes back to local shareholder



➤ Who determines Deviation?

(→see page 9)



Multidimensional Governance

(sample for listed company)

Ownership

- A-Co 78.4% in Holding (40% indirect P-Co)
- P-Co Family 21.6% in Holding (11% indirect P-Co.)

Voting Rights on Integration Path

- A-Co 78.4% - α (e.g.30%)
- P-Co Family 21.6% + α (e.g.30%)
- Pooling Holding controls board of P-Co and other strategic decisions

Integration Path

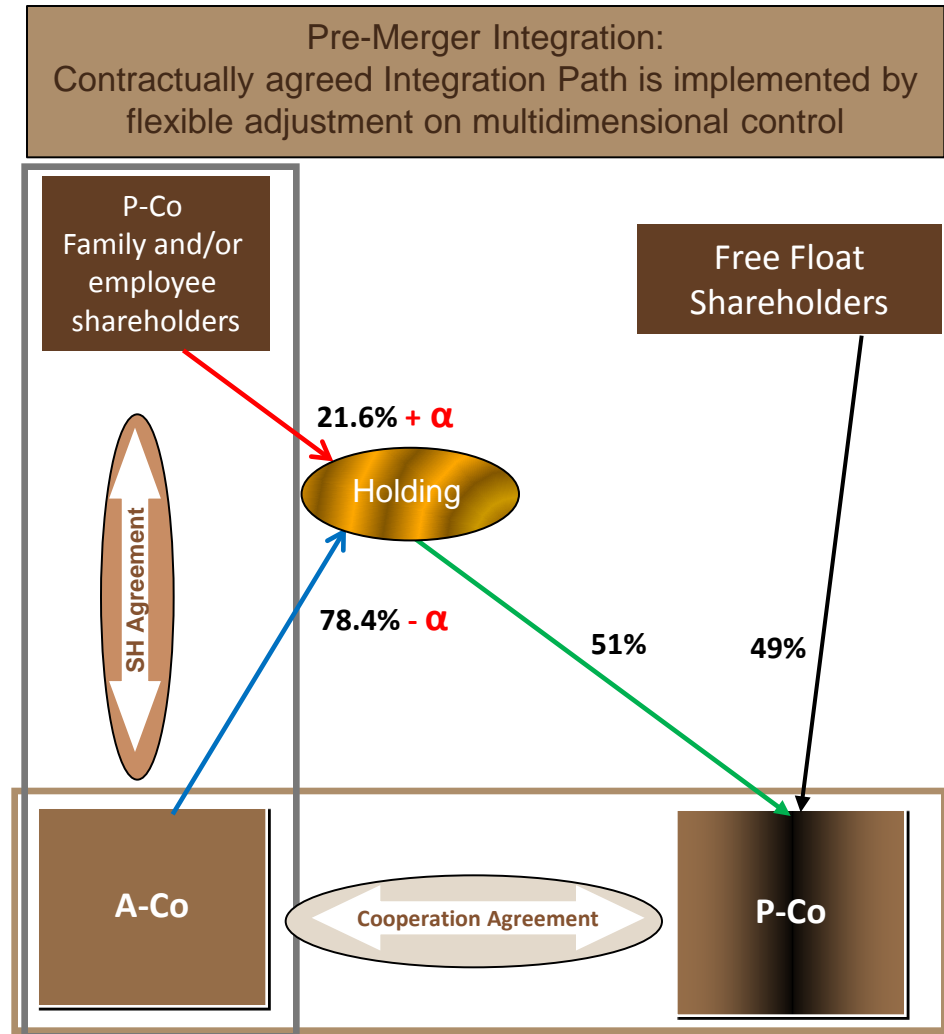
- Processes and objectives for integration of P-Co into A-Co Group defined in the Shareholders' Agreement and the Cooperation Agreement
- Measure of integration at eye-level

Operative Management

- In full responsibility of P-Co Family as long as Integration Path is observed
- In case of deviation " α " declines to zero until deviation is corrected

Time frame

- Depending on need of businesses
- Clear time frame is essential to warrant unified ownership





Multidimensional Governance managing Crisis

(sample for listed company)

Ownership

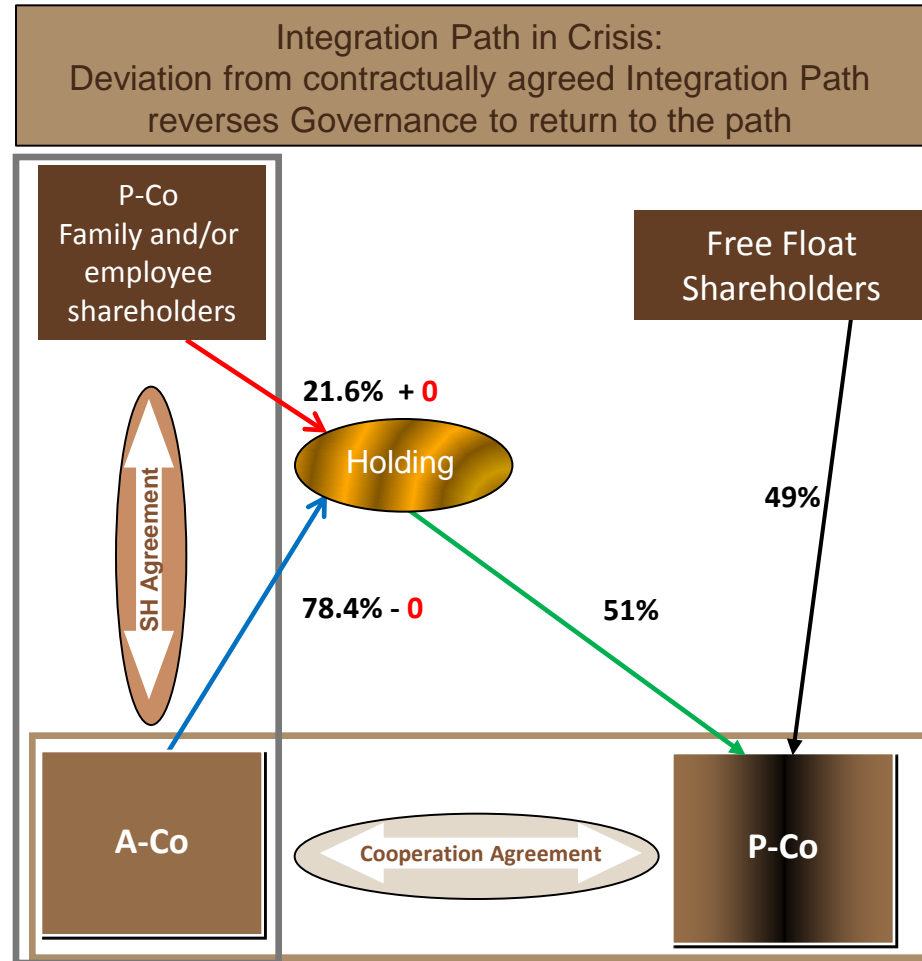
- A-Co 78.4% in Holding (40% indirect P-Co)
- P-Co Family 21.6% in Holding (11% indirect P-Co.)

Voting Rights in Crisis

- A-Co 78.4% - **0%**
- P-Co Family 21.6% + **0%**
- Pooling agreement suspended, until integration path is reached again under leadership of A-Co.
- A-Co can use majority in Pooling Holding
- A-Co can exchange or appoint additional members of Board of Directors and take control over P-Co`s operative business

Re-establish Governance after correction of deviation

- A-Co is obliged re-establish Multidimensional Governance after crisis is overcome
- After reinstalling implementation of Integration Path **α** is reestablished and control goes back to P-Co Family



➤ Who determines Deviation?

(→see page 9)



Determining Deviation – Mutually or by reciprocal risk of dispute

- **Discrepancy from the integration path does not automatically lead to a crisis, e.g.**
 - E.g. quantitative criteria of the integration path are not met and P-Co acknowledges this
 - Other discrepancy, which is settled between P-Co and A-Co
- **“Crisis”:**
 - A-Co alleges a discrepancy from the integration path; repeated warnings and settlement negotiations did not have any effect
 - P-Co disputes discrepancy and/or refuses settlement.
- **Interim situation until completion:**
 - A-Co may use its majority (in the Pooling Holding) under corporate law by invoking the discrepancy from the integration path
 - A-Co bears the risk of later award that denies discrepancy
- **Determination:**
 - For quantitative criteria: By expert statement by a CPA
 - For qualitative criteria: By arbitration award
- **Protection of P-Co** (Claims for the case that arbitral tribunal denies a „crisis“)
 - Damages/penalty payments
 - Indemnity payments for recalled board members
 - Payment of a control premium
- **Protection of A-Co** (enforcement of majority rights)
 - CPA expert statement or Request for arbitration sufficient for the suspension of the pooling agreement (not completion of the arbitral proceedings)
 - P-Co may not invoke preliminary injunctions
 - P-Co can claim damages gradually increasing only depending on negligence and intent of A-Co