

DEPARTMENT OF TRADE, INDUSTRY AND COMPETITION

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Guidelines on Minority Shareholder Protections

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Final

1. PREFACE

1.1. These Guidelines have been prepared in terms of section 79(1) of the Competition Act No. 89 of 1998 (as amended) (“the Act” or “Competition Act”) which provides that the Competition Commission (“Commission”) may prepare guidelines to indicate its policy approach to any matter falling within its jurisdiction in terms of the Act.

1.2. These Guidelines have been prepared in order to provide guidance to parties on what approach the Commission is likely to adopt in assessing a transaction, which would not ordinarily cross the bright line of merger notification, but would amount to the acquisition of a form of control being acquired by a minority shareholder.

1.3. The Commission recognises that the analysis of a transaction akin to those mentioned in paragraph 1.2 above is dependent on the facts of a specific case and, as a result, these Guidelines should not be interpreted as preventing the Commission from exercising its discretion to request information, or in assessing other factors not indicated in these Guidelines, on a case-by-case basis.

1.4. These Guidelines are not binding on the Commission, the Tribunal or the Courts but any person interpreting or applying section 12 of the Act must take these Guidelines into account.¹

¹ Section 79(4) of the Act.

2. DEFINITIONS

The following terms are applicable to these Guidelines –

2.1. “**Acquiring Firm**” means a firm-

- a) that, as a result of a transaction in any circumstances set out in section 12 of the Act, would directly or indirectly acquire, or establish direct or indirect control over, the whole or part of the business of another firm;
- b) that has direct or indirect control over the whole or part of the business of a firm contemplated in paragraph (a); or
- c) the whole or part of whose business is directly or indirectly controlled by a firm contemplated in paragraph (a) or (b).

2.2. “**Act**” means the Competition Act No. 89 of 1998, as amended;

2.3. “**CAC**” means Competition Appeal Court established in terms of section 36 of the 1998 Act;

2.4. “**Commission**” means the Competition Commission of South Africa established in terms of section 19 of the 1998 Act;

2.5. “**Company**” has the same meaning as defined in section 1 of the Companies Act No. 71 of 2008, as amended;

2.6. “**Competition Authorities**” refers collectively to the Commission, the Tribunal and the CAC, as the case may be;

2.7. **“Failure to notify”** means the failure to notify a notifiable transaction as contemplated in section 13A of the Act;

2.8. **“Firm”** includes a person (juristic or natural), partnership or a trust;

2.9. **“Guidelines”** means these guidelines which have been prepared and issued in terms of section 79(1) of the Act;

2.10. **“Merger”** means a merger as defined in section 12(1) of the Act and includes a proposed merger;

2.11. **“Minority Shareholder Protection”** means rights conferred on minority shareholders to protect their interest as investors in a firm;

2.12. **“Target Firm”** means a firm-

- a) the whole or part of whose business would be directly or indirectly controlled by an acquiring firm as a result of a transaction in any circumstances set out in section 12 of the Act;
- b) that, as a result of a transaction in any circumstances set out in section 12 of the Act, would directly or indirectly transfer direct or indirect control of the whole or part of, its business to an acquiring firm; or
- c) the whole or part of whose business is directly or indirectly controlled by a firm contemplated in paragraph (a) or (b) above; and

2.13. **“Tribunal”** means the Competition Tribunal of South Africa established in terms of section 26 of the Competition Act, No. 89 of 1998.

3. INTRODUCTION

3.1. These Guidelines have been prepared to provide guidance as to the Commission's likely approach when assessing rights attaching to minority shareholdings. Such rights are generally (but not always or exclusively) contained in a shareholders' agreement or memorandum of incorporation. These Guidelines do not cover other rights (not attaching to a minority shareholding) which may nevertheless confer control in certain circumstances.

3.2. The focus of these Guidelines is on rights attaching to minority shareholder rights and the assessment of whether those rights confer control on minority shareholders.

3.3. These Guidelines apply generally and are not market, sector or industry specific.

3.4. The principles outlined in these Guidelines are based on the Commission's experience and exposure to a variety of transactions, competition law jurisprudence from the Tribunal and CAC, as well as guidance from other jurisdictions where appropriate.

4. LEGISLATIVE FRAMEWORK

4.1. Where parties are not sure as to whether a transaction involves the acquisition of Minority Shareholder Protections which confer and/or relate to the acquisition of control, the Commission will undertake a control assessment in order to determine

whether the right in question constitute control and accordingly a merger in terms of section 12 of the Act.²

4.2. A merger is defined in section 12(1)(a) of the Competition Act, as occurring “*when one or more firms directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another firm.*” Section 12(1)(b) provides for the various ways in which such an acquisition of control may be achieved.

4.3. Section 12(2) specifies various instances of control and specifically states that:

“A person controls a firm if that person-

(a) *beneficially owns more than one half of the issued share capital of the firm;*

(b) *is entitled to vote a majority of the votes that may be cast at a general meeting of the firm, or has the ability to control the voting of a majority of those votes, either directly or indirectly or through a controlled entity of that person.”*

(c) *is able to appoint or to veto the appointment of the majority of the directors of a firm;*

² *African Media Entertainment Ltd v Lewis NO and Others* (68/CAC/MAR/07) [2008] ZACAC 4 para 16.

(d) *is a holding company, and the firm is a subsidiary of that company as contemplated in section 1(3)(a) of the Companies Act, 1973;*

(e) *in the case of a firm that is a trust, has the ability to control the majority of the votes of the trustees, to appoint the majority of the trustees or to appoint or change the majority of the beneficiaries of the trust;*

(f) *in the case of a close corporation, owns the majority of members' interest or controls directly or has the right to control the majority of members' votes in the close corporation; or*

(g) *has the ability to materially influence the policy of a firm in a manner comparable to a person who, in ordinary commercial practice, can exercise an element of control referred to in paragraphs (a) to (f)."*

4.4. The CAC has previously held that "...the purpose of merger control envisages a wide definition of control, so as to allow the relevant competition authorities a wide range of transactions which could result in an alteration of the market structure and in particular reduce the level of competition in the relevant market".³ If a transaction falls within the ambit of any one of the instances listed in section 12(2)

³ *Distillers Corporation (SA) Ltd and Another v Bulmer (SA) (Pty) Ltd and Another* (08/CAC/May01) [2001] ZACAC 4 page 24.

of the Act, it will constitute a merger and will trigger the investigative powers of the Commission, subject to the monetary thresholds for notifiable mergers being met.⁴

4.5. The CAC in *Distillers* confirmed the position previously taken by the Tribunal that different forms of control as set out in section 12(2) of the Act can co-exist and that the list in section 12(2) is not to be viewed as an exhaustive list of instances where there is a change in control.⁵ Accordingly there can be a situation where more than one party simultaneously exercises control over the company.⁶

4.6. When parties to a particular transaction contemplate whether a transaction involving a Minority Shareholder Protection confers control, the Minority Shareholder Protections must be broadly considered in terms of section 12(2)(g) of the Act. The CAC has also held that in terms of section 12(2)(g) of the Act, the term “...‘ability’ found in (g) can be viewed as a power derived from an agreement in the same way that powers in (a) to (d) are sourced from instruments such as a shareholders agreement...the influence [which] the provision speaks of must be over ‘the policy of the firm’. ‘Policy of the firm’ typically relates to strategic or important decisions of a firm such as budgets, business plans, major investments and/or appointment of senior management...”⁷

⁴ *Competition Commission v Hosken Consolidated Investment Ltd and Another* [2019] ZACC 2 para 45.

⁵ See *Bulmer SA (Proprietary) Limited & Ano v Distillers Corporation (SA) & Others* (CT 94/FN/Nov00 and 101/FN/Dec00) at p12-14 and *Caxton and CTP Publishers and Printers Limited v Naspers and Others* (CT16/FN/Mar04) at para 23 where the Tribunal said “Previous decisions of the Competition Appeal Court and the Tribunal have indicated that this list (section 12(2)(a)-(g)) is not to be viewed as exhaustive of all the possibilities for acquiring control, but rather in the language of the Court (CAC), that it lists ‘instances’ of where there is a change of control. There is thus room to argue that a change of control has taken place even where it has followed a form not provided for in section 12(2).”

⁶ *Caxton and CTP Publishers and Printers Limited v Naspers and Others* (CT16/FN/Mar04) para 25.

⁷ *Caxton And CTP Publishers And Printers Limited and Others v Multichoice Proprietary Limited and Others* (140/CAC/MAR16, 08/36380) [2016] ZACAC 2 para 73-74.

4.7. In terms of section 12(2)(g) of the Act, the acquisition or establishment of control also relates to the ability of a firm to exercise material influence over a company or firm in a manner comparable to a person who, in ordinary commercial practice, can exercise an element of control referred to in paragraphs 12(2) (a) to (f) of the Act. In relation to material influence, the CAC has held that “...[t]he range of influence, so required however, need not be as extensive as that which is exercised directly by shareholders in general meetings or indirectly through the board by the person with power to appoint directors, it must though, as in both instances be ‘reasonably extensive since otherwise it will not be comparable to the influence exercised by a person with control contemplated in paras (a) to (d)’...”⁸ (emphasis added)

4.8. A minority shareholding in a company does not automatically entitle a shareholder to exercise control over a firm. However, in terms of section 12(2)(g) of the Act, a minority shareholder may be regarded as having acquired control for notification purposes if the minority shareholder has the ability to materially influence the company’s policies in a manner comparable to a person that enjoys the economic or political benefits of ownership as contemplated in terms of section 12(2)(a) to (d).

⁸ *Caxton And CTP Publishers And Printers Limited and Others v Multichoice Proprietary Limited and Others* (140/CAC/MAR16, 08/36380) [2016] ZACAC 2 para 75.

5. MINORITY SHAREHOLDER PROTECTIONS

5.1. Minority Shareholder Protections are generally understood as measures that are put in place to safeguard the rights and interests of shareholders who generally own less than 50% of the share interest of a company or firm.⁹ The rationale for such protections for minority shareholders stems from the notion that a company's affairs operate generally by way of majority rule.¹⁰

5.2. Minority Shareholder Protections include, but are not limited to, veto rights relating to the strategic matters of the firm(s) such as budgets, business plans, appointment and removal of managers or directors of the firm(s).¹¹ Minority protections may be necessary to protect the investment made by the minority shareholder(s) in the company.¹² Not all minority protections however confer control. The test whether minority protections are necessary to protect investment and whether they affect matters of strategy is a factual and legal assessment determined on case by case basis.

5.3. In terms of the *European Commission Consolidated Jurisdictional Notice*¹³ ("EC Jurisdictional Notice"), a merger (concentration) may occur on a legal or a *de facto*

⁹ <https://www.albaraka.co.za/blogs/legalease-1-2023/protection-of-minority-shareholders-in-south-africa-a-brief-overview-of-section-163-of-the-companies-act-71-of-2008>

¹⁰ Section 65(5) of the Companies Act No. 17 of 2008 and Maleka Famida Cassim 'Shareholder remedies and minority protection' in FHI Cassim (ed) *Contemporary Company Law* 2ed (2012) 757 – 758.

¹¹ European Commission Consolidated Jurisdictional Notice (EC) No. 139/2004 on the control of concentrations between undertakings paragraph 67.

¹² European Commission Consolidated Jurisdictional Notice (EC) No. 139/2004 on the control of concentrations between undertakings paragraph 66.

¹³ European Commission Consolidated Jurisdictional Notice (EC) No. 139/2004 on the control of concentrations between undertakings.

basis and may take the form of sole or joint control either extending to the whole or parts of one or more undertakings.¹⁴

5.4. The EC Jurisdictional Notice provides that veto rights which confer joint control must be related to the “strategic decisions on the business policy of the company” and they must go beyond the veto rights normally accorded to minority shareholders in order to protect their financial interests.¹⁵ The EC Jurisdictional Notice asserts that veto rights which typically confer joint control include decisions on issues such as the budget, the business plan, major investment or the appointment of senior management.¹⁶

5.5. In addition, the EC Jurisdictional Notice makes it clear that in order to acquire joint control, it is not necessary for a minority shareholder to have all the veto rights mentioned above.¹⁷

5.6. Generally, minority protections serve as a safeguard for minority shareholders in order to ensure that significant changes which affect a company’s corporate structure and solvency, which may potentially have ramifications on their financial interest or investment in the company, will not be taken without their consent.

¹⁴ European Commission Consolidated Jurisdictional Notice (EC) No. 139/2004 on the control of concentrations between undertakings para 6.

¹⁵ European Commission Consolidated Jurisdictional Notice under council Regulation (EC) No.139/2004 on the control of concentrations between undertakings, paragraph 66

¹⁶ European Commission Consolidated Jurisdictional Notice under council Regulation (EC) No.139/2004 on the control of concentrations between undertakings, paragraph 67

¹⁷ European Commission Consolidated Jurisdictional Notice under council Regulation (EC) No.139/2004 on the control of concentrations between undertakings, paragraph 68

5.7. The Commission will therefore examine each case on its own merits to determine whether the particular minority protection right in the context of the business of the company confers control. As mentioned above, the test of whether minority protections are necessary to protect investment or matters of strategy is a factual and a legal assessment.

6. THE COMMISSION'S GENERAL APPROACH TO ASSESSING MINORITY SHAREHOLDER PROTECTION RIGHTS

6.1. The Commission notes that there may be instances where a firm does not acquire a majority shareholding. For example there may be instances where a minority shareholder may acquire control through veto rights or minority protections which confer control depending on the nature and the content of the veto rights or minority protection. The Commission may in these instances still require notification of a transaction resulting in a change of control of the Target Firm where minority shareholders acquire control.

6.2. The Commission further notes that it may also require merger notification if a transaction results in the direct or indirect change and/or the acquisition of control rights by minority shareholders in terms of section 12(2)(g) of the Act, subject to the requisite financial thresholds being met.

6.3. A clear distinction must be drawn between minority protections which confer control and those which do not confer control. Both types of protections are aimed at protecting the investment of a minority shareholder.

6.4. Generally, a special resolution may be a form of Minority Shareholder Protection. Statutory special resolutions set out in the Companies Act do not confer control. We set out below the statutory special resolutions in terms of the Companies Act:¹⁸

“A special resolution is required to—

(a) amend the company’s Memorandum of Incorporation to the extent required by section 16(1)(c) and section 36(2)(a);

(b) ratify a consolidated revision of a company’s Memorandum of Incorporation, as contemplated in section 18(1)(b);

(c) ratify actions by the company or directors in excess of their authority, as contemplated in section 20(2);

(d) approve an issue of shares or grant of rights in the circumstances contemplated in section 41(1);

(e) approve an issue of shares or securities as contemplated in section 41(3);

¹⁸ Section 65(11) of the Companies Act, as amended No 71 of 2008.

(f) authorise the board to grant financial assistance in the circumstances contemplated in section 44(3)(a)(ii) or 45(3)(a)(ii);

(g) approve a decision of the board for re-acquisition of shares in the circumstances contemplated in section 48(8);

(h) authorise the basis for compensation to directors of a profit company, as required by section 66(9);

(i) approve the voluntary winding up of the company, as contemplated in section 80(1);

(j) approve the winding up of a company in the circumstances contemplated in section 81(1);

(k) approve an application to transfer the registration of the company to a foreign jurisdiction as contemplated in section 82(5);

(l) approve any proposed fundamental transaction, to the extent required by Part A of Chapter 5;

(m) revoke a resolution contemplated in section 164(9)(c)"

6.5. Whether or not control has been acquired by a minority shareholder is a factual question which must be determined on a case by case basis and all the rights that may be exercised by the minority shareholder will have to be considered in combination with each other in order to determine whether such a minority shareholder is able to influence strategic decisions and commercial strategies of a target firm.

6.6. As indicated above, the Commission is not concerned with ordinary minority investment protections. A non-exhaustive list of examples of Minority Shareholder Protections which typically do not confer control is set out in **Annexure A** below.

6.7. Transactions which result in the acquisition of Minority Shareholder Protections are likely to be of concern to the Commission, particularly if the transaction meets the requisite merger notification thresholds. A non-exhaustive list of Minority Shareholder Protections which are likely to confer control is set out in **Annexure B** below.

6.8. Section 12(2)(g) of the Act, which sets out the test for determining whether a Minority Shareholder Protection is control conferring has been interpreted in case law as including an enquiry as to whether the minority protection(s) in question provide the minority shareholder with a right to steer a firm or to appoint persons to steer the firm.¹⁹ If parties are unsure on whether a minority protection confers

¹⁹ *Caxton and CTP Publishers and Printers v Media 24 Proprietary Limited and Others* (136/CAC/March 2015) [2015] ZACAC 5 para 45.

control or not, they may approach the Commission for an advisory opinion in terms of the Regulations on Non-Binding Advisory Opinions, 2024.

6.9. In assessing Minority Shareholder Protection rights, the Commission will generally adopt, *inter alia*, the following approach:

6.9.1. assess whether the transaction would amount to a change of control or an acquisition of control in terms of section 12(2)(g) of the Act;

6.9.2. assess the content of the right(s) in question and its (their) importance within the context of the specific business;²⁰

6.9.3. analyse whether the Minority Shareholder Protection relates to strategic decisions of the firm or enables the minority shareholder to influence or constrain the strategic decisions of the firm;

6.9.4. analyse whether the Minority Shareholder Protection is financial and is aimed at protecting the investment of the minority shareholder in a firm i.e. whether Minority Shareholder Protection extends beyond the purpose of protecting the minority shareholder's investment in the firm; and

6.9.5. analyse whether the Minority Shareholder Protection will materially influence the day-to-day running of the firm or its daily operations.

²⁰ Commission Consolidated Jurisdictional Notice under council Regulation (EC) No.139/2004 on the control concentrations between undertakings para 68.

6.10. The Commission will therefore only be interested in transactions which change and/or result in the acquisition of Minority Shareholder Protection rights in a firm that go beyond ordinary minority investment protections.

6.11. The Commission notes that the nature, content and purpose of Minority Shareholder Protections are not the same and consequently each transaction will be assessed on its own merits.

7. DISCRETION

7.1. Section 79(4) of the Act provides that a guideline issued by the Commission is not binding, but that any person interpreting or applying the Act must take the guideline into account. This means that any person interpreting or applying section 12 of the Act must consider the present Guidelines.

7.2. The Guidelines present the general methodology that the Commission will follow in assessing whether Minority Shareholder Protections amount to a merger and requires notification to the Commission. Notwithstanding the above, the Guidelines do not fetter the discretion of the Commission to consider other factors on a case-by-case basis should a need arise.

8. EFFECTIVE DATE AND AMENDMENTS

8.1. These Guidelines become effective on the date indicated in the Government Gazette and may be amended by the Commission from time to time.

ANNEXURE A - MINORITY SHAREHOLDER PROTECTIONS WHICH TYPICALLY DO NOT CONFER CONTROL

1. The right to approve or decline the acquisition or disposal of any asset/s, other than in the ordinary course of business, whether corporeal or incorporeal, tangible or intangible, and specifically including shares, whether in a single transaction or a series of integrated transactions by a firm or any of its subsidiaries.
2. The right to approve or decline any decisions relating to any change to the dividend policy of the firm.
3. The right to approve or decline the appointment or removal of the auditors of the firm.
4. The right to approve or decline the conclusion of any agreement by the firm which provides for the sharing of any profits or revenues of the firm.
5. The right to approve or decline the liquidation or winding-up of, or the discontinuance of the business activities of, any group member.
6. The right to approve or decline a decision concerning the public listing of the firm.

7. The right to approve or decline a decision concerning any change in the basis of accounting used by the firm.
8. The right to approve or decline a decision concerning the granting of a loan, guarantee or security, the variation of the terms of any loan, guarantee or security, or the repayment or discharge thereof.
9. The right to approve or decline the establishment, acquisition or purchase of any business, share, asset or other investment in a firm other than in the ordinary course of business of the firm.
10. The right to approve or decline the acquisition or the repurchase by the firm of any of its shares or other securities.
11. The right to approve or decline the entering into of any joint venture, partnership or similar arrangement, or entering into any transaction which is not in the ordinary course of the business of the firm.
12. The right to approve the commencement by the firm of business rescue proceedings in accordance with section 129 of the Companies Act, or the taking of any steps in connection therewith, save to the extent that the firm is obliged by the Companies Act to proceed with such steps.

13. The right to approve or decline a decision approving and/or declining the deregistration, voluntary liquidation or winding up of the firm.
14. The right to approve or decline a decision to institute litigation or settle any claim outside the ordinary course of business of the firm.
15. The right to approve or decline a decision concerning the variation, amendment and alteration to the Memorandum of Incorporation of the firm.
16. The right to approve or decline the conclusion or amendment of any agreement providing for the disposal or licensing of the intellectual property of the firm or any of its subsidiaries.

ANNEXURE B - MINORITY SHAREHOLDER PROTECTIONS WHICH ARE LIKELY TO CONFER CONTROL

1. The right to approve and/or veto or decline the strategy or the business plan.
2. The right to approve and/or veto or decline the appointment of the Chief Executive Officer or Chief Financial Officer of the firm, or the amendment of any material term of such person's appointment.
3. The right to approve and/or veto or decline the dismissal of an executive of the firm.

4. The right to approve and/or veto or decline the budget.
5. The right to approve and/or veto or decline the firm from competing with the minority shareholder.