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DRAFT GUIDELINES ON INTERNAL RESTRUCTURING

The Competition Commission hereby, in terms of section 79(1) of the Competition Act No. 89 of 1998 (as amended), which allows the Competition Commission to prepare guidelines to indicate its policy approach on any matter falling within its jurisdiction, issues these draft guidelines on the Commission's handling of confidential information in terms of the Competition Act, for public comment.

Written comments are invited by the Competition Commission from any interested person.

The Draft Guidelines on the Commission's handling of confidential information in terms of the Competition Act is attached hereto and can also be downloaded from www.compcom.co.za.

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CLOSING DATE FOR SUBMISSION OF COMMENTS: 21 FEBRUARY 2025 at 16h30.

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Guidelines on internal restructuring in terms of the Competition Act No.89 of 1998 (as amended)

Draft: January 2025

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1. PREFACE

1.1. These Guidelines has been prepared in terms of section 79(1) of the Competition Act No. 89 of 1998 (as amended) ("the 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 the Commission is likely to determine to be a transaction which constitutes an internal restructuring and the circumstances when a merger notification may be required regardless.

1.3. The Commission recognises that merger analysis 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. **"Commission"** means the Competition Commission of South Africa established in terms of section 19 of the 1998 Act;

2.4. **"CAC"** means Competition Appeal Court established in terms of section 36 of the 1998 Act;

2.5. **"Competition Authorities"**; refers collectively to the Commission, the Tribunal and the CAC as the case may be;

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

2.7. **"Firm"** includes a person (juristic or natural), partnership or a trust;

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

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

2.10. **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;

2.11. **"Tribunal"** means the Competition Tribunal of South Africa established in terms of section 26 Competition Act, No. 89 of 1998.

3. INTRODUCTION

3.1. These Guidelines have been prepared in order to provide guidance to parties on what the Commission is likely to determine to be a transaction which constitutes an internal restructuring which does not require notification to the Commission and the limited and narrow circumstances when a merger notification may be required..

3.2. These Guidelines only deal with control under section 12(1) and (2) of the Act *only* to the extent that it is relevant for assessing whether a transaction constitutes an internal restructuring. Further, these Guidelines are not intended to comprehensively deal with the definition of merger in terms of section 12(1) of the Act and the competitive and public interest assessment in terms of section 12A of the Act.

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 assessment of a variety of transactions, competition law jurisprudence from the Tribunal and the CAC, as well as guidance from other jurisdictions where appropriate.

4. INTERNAL RESTRUCTURING

4.1. For purposes of these Guidelines, internal restructuring refers to transactions within a group of firms.

4.2. The European Commission Consolidated Jurisdictional Notice ("EC Jurisdictional Notice"), under the heading "internal restructuring" provides that an internal restructuring within a group of companies does not constitute a concentration (notifiable merger).

4.3. The European Commission's Jurisdictional Notice does not regard internal restructuring within a group of companies as a notifiable merger.

4.4. However, the CAC, in responding to the contention that when section 12(1) refers to "*the direct or indirect acquisition or direct or indirect establishment of control*" it refers exclusively to "*ultimate control"* and unless *"ultimate control*" changes as a result of the transaction in question, such a transaction falls outside the scope of section 12 (in terms of this argument only one form of control is relevant – "*ultimate control*"), that "*such an interpretation is not mandated by the express wording of section 12(1). To the contrary, section 12(1) makes no express provision for the exclusion of transactions between a company and its wholly owned subsidiary, from the definition of a merger*."[2]

[2] *Distillers Corporation (SA) Ltd and Another v Bulmer (SA) (Pty) Ltd and Another* (08/CAC/May01) [2001] ZACAC 4 page 25.

5. LEGISLATIVE FRAMEWORK

5.1. Where parties to an internal restructuring transaction approach the Commission because they are not certain as to whether a transaction concerns a change of control, the Commission will undertake a control assessment in order to determine whether a merger has taken place in terms of section 12 of the Act.[3]

5.2. In determining whether a transaction constitutes an internal restructuring, the Commission will examine the current control structure and the control structure which will come into existence after the proposed transaction has been implemented.[4]

5.3. 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.

5.4. Section 12(2) sets out a non-exhaustive list of instances of control and states that:

"*A person controls a firm if that person-*

[3] African Media Entertainment Ltd v Lewis NO and Others (68/CAC/MAR/07) [2008] ZACAC 4 para 16.
[4] Mondi Ltd; Mondi PLC And Competition Commission Case No: LM247Jan19/JUR262Feb19 para 10.

(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;

(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).

5.5. Although different instances of control are contemplated in section 12(2)(a)-(g), all the listed instances have in common the acquisition of direct or indirect control over the whole or part of "another" firm.

5.6. According to the CAC, section 12(1) of the Act makes no express provision for the exclusion of transactions between a company and its wholly-owned subsidiary from the definition of a merger.[5] In particular, section 12(1) refers to both indirect and direct acquisitions of control and thus recognizes multiple ways in which control can be acquired.

5.7. If a transaction falls within the ambit of any one of the instances listed in section 12(2) of the Act, it will be a merger and will trigger the investigative powers of the Commission, subject to the monetary thresholds for notifiable mergers.[6] Therefore, a change in direct control presumptively triggers the obligation to notify.

[5] *Distillers Corporation (SA) Ltd and Another v Bulmer (SA) (Pty) Ltd and Another* (08/CAC/May01) [2001] ZACAC 4 page 19 – 20.
[6] *Competition Commission v Hosken Consolidated Investment Ltd and Another* [2019] ZACC 2 para 45.

5.8. Section 12(2) of the Act provides for various ways in which control can be acquired by a firm.[7] The wording of section 12(2), therefore recognises a situation where more than one party simultaneously exercises control over a company.[8] The CAC has 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*".[9]

6. THE COMMISSION'S GENERAL APPROACH TO ASSESSING INTERNAL RESTRUCTURING TRANSACTIONS

6.1. Generally, the Commission will not require notification of a transaction that is "purely internal" and has no implications on the control rights of other shareholders who are not part of the group of companies but may have an interest in one or more of the firms within the group of companies ("external shareholders"). External shareholders are usually minority shareholders who may have negative control rights in one or more firms in a group of companies. Even in circumstance where the ultimate controller may not change, a merger notification may still be required if a transaction results in the change of the control rights of minority shareholders who have an interest in one or more firms within a group of companies. If there are no minority shareholders whose

[7] *Distillers Corporation (SA) Ltd and Another v Bulmer (SA) (Pty) Ltd and Another* (08/CAC/May01) [2001] ZACAC 4 page 19.
[8] *Distillers Corporation (SA) Ltd and Another v Bulmer (SA) (Pty) Ltd and Another* (08/CAC/May01) [2001] ZACAC 4 page 25.
[9] *Distillers Corporation (SA) Ltd and Another v Bulmer (SA) (Pty) Ltd and Another* (08/CAC/May01) [2001] ZACAC 4 page 24.

negative control rights are affected by a transaction, the transaction is purely internal and does not require notification to the Commission..

6.2. The Commission, in general, will adopt the following approach when assessing whether a transaction constitutes an internal restructuring and changes the control rights of external minority shareholders and whether it may require notification under the Act:

6.2.1. where the proposed restructuring would amount to a change or an acquisition of control in line with the instances listed in section 12(2)(a)-(g) of the Act and thus changing the control rights of external minority shareholders;

6.2.2. where the proposed restructuring results in a loss or gain of any form of negative control[10] by a shareholder that is not part of the group of companies;

6.2.3. where there is an external shareholder who has minority rights conferring control, for example through veto rights in one or more firms within a group of companies, whose control rights will be changed by the transaction.

[10] This refers to the ability of a firm to create a determinative effect on the commercial conduct of a firm by possessing veto rights with respect to its strategic commercial decisions. (https://www.lexology.com/commentary/competition-antitrust/turkey/elig-attorneys-at-law/competition-authority-publishes-guidelines-on-mergers-and-acquisitions#:~:text=Both%20sole%20and%20joint%20control,to%20its%20strategic%20commercial%20decisions.)

6.3. An intra group reorganisation must not change the control rights, particularly for external minority shareholders in order for the transaction not to trigger the Act's notification requirements. Minority shareholder rights which confer control include, but are not limited to, veto rights relating to strategic matters of the target firm(s), such as budgets, business plans, appointment and removal of managers or directors of the target firm(s). The Commission is not concerned with ordinary minority investment protections such as a decision to change the nature of the business of the target firm, alteration of the share capital, etc.

6.4. The Commission therefore is generally concerned with the control rights of minority shareholders when it comes to intra group transactions and thus where these transactions change external minority shareholder control rights, they will likely require notification in terms of the Act. If they do not, they will not require notification.

6.5. The Commission notes that internal restructurings are not always undertaken in the same format and consequently each transaction should be assessed on its own merits. If the intra group transaction does not affect external minority shareholders control rights, the Commission will not require notification.

7. DISCRETION

7.1. Section 79(4) provides that a guideline issued by the Commission is not binding, but any person interpreting or applying the Act must take the guideline into

account. This means that any person interpreting or applying section 12 must consider the present guidelines. The above guidelines thus present the general methodology that the Commission will follow in assessing whether an internal restructuring amounts to a merger and requires notification to the Commission. Notwithstanding the above, this will 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.