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## Guidelines provide clarity on approvals

## By **BURTON PHILLIPS** Webber Wentzel

The Competition Commission recently published guidelines aiming to provide clarity on whether internal restructurings require prior approval from the competition authorities.

The final guidelines, published on April 4 2025, distinguish between transactions occurring within the same group of companies, referring to those as "purely internal" and restructurings involving external minority shareholders.

This is an important development as businesses undergoing purely internal restructurings no longer need to wrestle with the uncertainty of whether such transactions should first be approved by the competition authorities. The debate on whether such transactions should be subject to competition approval before implementation has arisen in several cases before the competition authorities.

Much of the uncertainty revolved around the Competition Appeal Court's decision in the Distillers case in which the court stated that the Competition Act makes "no express provision for the exclusion of transactions between a company and its wholly owned subsidiary" from being subject to competition approval. On this basis, all transactions involving an acquisition of direct control over a firm (including transactions between wholly owned subsidiaries) could be subject to approval (if the relevant threshold is met), even if there is no change in ultimate, indirect control, an approach which the commission has relied on to assert jurisdiction over some transactions.

Despite the appeal court's ruling, the commission in its guidelines appears to be adopting a more pragmatic approach to restructurings within the same group of companies. This will mean that in internal restructurings where there is no third party, minority shareholders will not be subject to competition approval. However, if there are minority shareholders holding interests in one or more of the companies within the group undertaking the restructure, such restructure would need to be closely assessed to determine whether they fall outside the purview of what the commission perceives as being a "purely internal" restructure.

In this regard, the commission remains concerned with transactions that may impact the control rights of minority shareholders. The guidelines draw a further distinction between ordinary minority shareholders and those with socalled negative control rights.

Negative control rights typically refer to those rights that afford minority shareholders the ability to veto certain strategic decision-making and generally manifests in the form of approval rights over matters such as senior management appointments, business plans and budgets. Based on the guidelines, transactions that may otherwise be construed as an internal restructuring could nevertheless be subject to approval, in the commission's view, if it has an impact on the negative control rights of minority shareholders.

This aspect is likely to be the subject of further debate since it suggests that even a loss of negative control rights by a minority shareholder could impact whether an internal restructuring requires competition approval, an interpretation that is not supported by the Competition Act which only requires the approval of transactions involving an "acquisition" or "establishment" of control, not a loss thereof.

## **Potential impact**

While the guidelines may raise unintended complexities for restructurings involving external minority shareholders, it provides clarity, at least as it relates to internal transactions within the same group of companies, on the commission's position and practical approach to restructurings. Internal restructurings involving minority shareholders at any level of the group of companies will need to be carefully considered with reference to the potential impact on the control rights of minority shareholders, although it remains to be seen how the commission will treat internal restructurings which may have an impact on minority negative control rights, but which would not otherwise require approval outside of an internal restructuring scenario.

Either way, the guidelines is a welcome step towards easing the regularly complexities and allowing internal restructurings, at least the pure ones, to be implemented quickly and efficiently. -Please note that this article updates last month's article, which referred to draft guidelines. The guidelines have since been finalised.